

THE *B D c*
DECISIONS
OF THE
ENGLISH JUDGES,
DURING THE USURPATION,

From the Year 1655, to his MAJESTY'S Restoration, and
the sitting down of the SESSION in *June* 1661.

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M DCC LXII.



A D V E R T I S E M E N T.

THE Manuscript of this Collection of Decisions, was given to the Editors from the Library of the Faculty of Advocates, and no other Copy could be found to compare it with. There are some passages in it where the sense is very imperfect. The Editors, after consulting very good Judges, were advised to print the Manuscript just as it stood, rather than endeavour to make the sense complete, and thereby to leave it in the power of all persons to judge for themselves. There are likewise a very few words and proper names left blank, because they could not be made out with certainty from the Manuscript.

T H E
D E C I S I O N S
O F T H E
E N G L I S H J U D G E S.

Nov. 23. 1655.

G I B *contra* B A L L A N T Y N E.

H A R Y G I B Soldier, an Englishman, pursues Captain Ballantyne, the young Laird of Corhouse, for payment of the sum of L. 100 sterling, promised by him to the pursuer, for saving of his life at the battle of Worchester. It was *excepted*, That bonds and promises, given *ob justum metum*, are null: and though the defender had not been under fear, yet this promise is not probable but by writ or oath of party, conform to the law in Scotland. It was *replied*, That the bond is valid; for the alledged *metus* in the Prætor's edict was *injustus*, being *ex vi illicita*; and that *ratione subjeſti et loci contractus*, he may prove the promise by witnesses, though exceeding an hundred pounds Scots; because in England, which is *locus celebrati contractus*, promises are probable by witnesses, though for a thousand. The Judges repelled the exception, in respect of the reply, and sustained the promise as probable by witnesses. *Vid. Dury, Feb. 12. 1642. Grant of Ballindalloch.*

Act. Fletcher.

Alt. Gilmer.

W. Donny, Clerk.

November 28. 1655.

Lieutenant S E X T O N *contra* T E N A N T S.

I N a removing, Lieutenant Sexton *contra* the Tenants of Lesmahago, it was found, a tenant could not be heard to quarrel his Master's right, if he has been in use to pay mail and duty to him, albeit his Master has never been infest. *Item*, A tacksman has right to warn and remove, though he be not infest; since it is a real right not requiring infestment, if he from whom he has right was infest.

Eodem die.

H U N T E R *contra* D A V I D S O N.

A Bond registrate after the debtor's decease may be the ground of a pursuit, in an ordinary action, against the heir or executor of the debtor; *et esto* it be said, that the bond is null, and cannot make any faith, seeing the same is registrate after the debtor's decease, who could not then establish a procurator to consent to the registration thereof; for this being *nullitas facti*, it must be pursued by way of action.

Act. Syme.

Alt. Trotter.

A

November

November 29. 1655.

BAIRD contra The Earl of MURRAY.

TH E Earl being cited for payment of a debt owing by his father to Sir John Baird, no process was granted against him, because he being minor the time of the citation, his tutors and curators were not called, and Sir John was ordained to cite him of new.

*Act. Baird.**Alt. Stewart.**J. Hay, Clerk.**Eodem die.**LUMSDEN, &c. contra BEATY.*

MR Thomas Lumsden and George Campbell having advocate a pursuit, moved at the instance of Robert Beaty, from the Magistrates of Edinburgh, upon this reason of iniquity, *viz.* That the said George being cautioner for Mr Thomas *judicio fisci et judicatum solvi*, and having presented the said Mr Thomas before the town-court of Edinburgh, and protested that he might be free of his cautionry, in respect he had sifted Mr Thomas in their judgment, and so made him liable to their jurisdiction, conform to his act of caution wherein he was allenarly so bound; the Bailies repelled this defence, and found that George the cautioner was bound also to Beaty the pursuer for payment of the debt owing by Mr Thomas; which advocacy being called, and the parties heard, the Lords advocates the cause to themselves, and finds the Bailies not judges to that question, *viz.* How far an act of caution of that tenor might extend? Thereafter George his procurators protested, That in respect they presented Mr Thomas at the bar, that George might be free of his act of caution found before the Town-council of Edinburgh; and the defenders protested in the contrary.

*Act. Syme & Fletcher.**Alt. Dalrymple & Maxwell.*

November 29. 1655.

SCOT contra TENANTS.

SIR John Scot against the Tenants of Garnock, belonging to my Lord Marischall. Sir John pursuing a poinding of the ground against them, or else craving the mails and duties upon a comprising for the bygones of an annualrent, wherein he was infest before the 18th of April 1648: *Excepted*, That my Lord Marischall, to whom the lands belonged, is forfeited; and that by the act of grace made by the Protector and his Council, the property of all lands belonging to forfeited persons is stated in the persons of certain trustees for the commonwealth, who ought to be called; by which act it is also provided, that no debt or incumbrance lying on the lands of forfeited persons shall be allowed till they give in their claims before these intrusted to that effect, and then to address themselves to the said trustees for their security; and this is prejudicial to any action for payment or for mails and duties; which the Lords Judges found to be true.

*Act. Dalrymple.**Alt. Wedderburn.**J. Hay, Clerk.*

November 30. 1655.

CLERK contra RUTHVEN.

A General and special declarator of the single escheat of umquhile Sir Francis Ruthven being pursued at the instance of John Clerk merchant and burgess of Edinburgh, against the tenants of Reidcastle and the Laird of

of Ruthven: *Excepted*, That there could be no declarator; because the horning, whereon the gift of escheat and declarator is grounded, bears Sir Francis to be denounced at the market-cross of Edinburgh; whereas, by the act of Parliament, all hornings whereupon gifts of escheat are purchased ought to be used at the market-cross of the head Burgh of the shire where the party denounced dwells, and where the rebel's moveables lie, which was Forfar; and so he not being denounced at Forfar, but only at Edinburgh, the denunciation, and rebellion following thereupon, cannot be a ground to make his moveables fall to the donator, though it might be ground to raise caption thereon, and apprehend his person. *Replied*, Sir Francis being out of the country, he had a warrant to charge him on 60 days, and to denounce him at the market-cross of Edinburgh as *communis patrie*, which is relevant in law to make his moveables fall in escheat, *cum bona mobilia sequantur debitorem*. This reply was sustained for the rebel's single-escheat against the exception; but, if it had been his liferent-escheat, the question and case had been altered.

Adv. Fletcher.

Adv. Wedderburn.

J. Brown, Clerk.

Eodem die,

— contra —

W H E N one is conveyed as successor *titulo lucrativo* &c. the pursuer must condescend upon what lands he bruiks as such; and if he be conveyed as heir, or as intromitter with heirship-goods, he must condescend upon what pieces of heirship he meddled with. But, in libelling universal intromission with goods and gear, there is no necessity of condescending, but to prove as they may be served.

Eodem die.

LUMSDEN contra BEATY.

I N the aforesaid cause Lumsden and Beaty, the first question is, Whether George, who was cautioner *judicio fisci et judicatum solvi*, could be conveyed for payment of the debt owing by Mr Thomas to Beaty, now since the cause was advocate, and that he had presented Mr Thomas his person in judgment? It was contended, he could not be liable for the debt, because, though burgesses within burgh had their special privilege to attach their debtors persons, and to make them find caution to answer as law will, contrary to the common law, yet, by the constant interpretation of the Lords of Session, it is found, that the act of caution extends to no more but to make the debtor sist in judgment, and noways to make one liable for the debt; for which several practices were alledged; and though *stylus curie* is always *judicio fisci et judicatum solvi*, yet *consuetudo* (which is *optima legum interpres*) restricts it to the first. *Replied*, This act of caution was not an act to answer as law will, but that he should be liable to the debt, and liable to the court of Edinburgh; which act the cautioner, Campbell, had subscribed, and from which he can never be loosed, by presenting Lumsden's person. The Lords found the consuetude and exposition thereof relevant, and assigned a term to the defender to prove that the style of cautioners, their bond to answer as law will, was always such; and that the ordinary interpretation of judges did extend it no farther than to *judicio fisci*. The consuetude was proven by sundry practices, and the *stylus curie per membra curie*: And this manner of probation was sustained.

Adv. Dalrymple & Maxwell.

Adv. Syme.

W. Downy, Clerk.

December

December 6. 1655.

D O W N I E *contra* The Town of D U N D E E.

CATHARINE DOUNIE pursuing the Magistrates of Dundee for payment of the sum of — as expences which she was put to in quartering soldiers, and entertaining them the space of some months, which quarterings the Town should have paid; and thir defenders must now pay, as being come in the place of these Magistrates who had promised to see her paid. *Excepted*, The libel is noways relevant against the present Magistrates, as liable in payment of that which their predecessors had promised, because the ordinary way of binding a debt upon a community, was either by giving bond in name of the town, or by getting an act of council to that effect; neither of which was libelled. This was repelled, and the libel found relevant, and admitted to probation.

Act. Gilmer.

Alt. Wedderburn.

J. Hay, Clerk.

Eodem die.

AN action of contravention may be pursued before an inferior judge, especially if the act of caution and lawborrows has been found in that court.

December 6. 1655.

N I S B E T *contra* M A X W E L L.

ONE Maxwell being pursued as cautioner for one Nisbet, for payment of a sum, conform to the extract of a bond from the registers in Ireland. *Excepted*, No process on this extract in Scotland, unless the principal were produced; because no extract of a Scottish bond makes faith in Ireland, no more should an Irish extract make faith in Scotland; and it was offered to be proven, that it was the custom of Ireland always to return the principal bond. *Replied*, The extract is sufficient to clear the debt against the cautioner, without production of the principal, unless that the defender offer to improve the principal as false and feigned. This reply was sustained, and they were ordained to pay against the debt. *Alledged*, No process against the cautioner; because it is offered to be proven, that the principal bond was retired and cancelled before famous witnesses, *omni exceptione majores*, and so the debt is presumed to be paid; because a bond *qualitercunque* retired, *et apud debitorem repertum inducit liberationem debiti*, especially as to the cautioner. *Replied*, *Non relevat*, unless he would say, that the debt was paid, either by the principal or cautioner. *Item*, It is false that a bond *qualitercunque* retired, is presumed paid, because it may fall out *casu* to come to the debtor's hand; and it is offered to be proven, that this bond being sent over by the creditor with one Mr Archibald Hamilton to one called Kennedy to pursue this defender on it, the ship wherein the said Hamilton was, was taken by the Captain of a frigate called Breslaw, and the bond was given to one M'Gowan, who thereafter gave it to this Maxwell the cautioner for a small thing. This reply was sustained, and the pursuer craved a commission to examine M'Gowan.

Act. Pitillo.

Alt. Dalrymple.

J. Hay, Clerk.

December 8. 1655.

N A I R N *contra* N A I R N.

ELISABETH NAIRN charging her brother Mr Robert Nairn for payment of 14000 merks, contained in several bonds granted by her

her father to her, for her provision and bairn's part of gear; he suspends on this reason, that the bonds were given by his father *in lecto aegritudinis* to his prejudice, who was heir, and for which he had intented reduction *super hoc capite*. *Answered*, The charger *in foro contradictorio* was assoilzied from this reduction, and so cannot be heard now *in hac instantia* to alledge thereon. *Replied*, That his present reduction is for reducing that decreet, which was given against him when he was absent, and taken away by the Highlanders, and so his procurator, for want of information from him, was deprived of a duply, which, had it been proponed at that time, he had prevailed; and which was thus, That where it was answered to his reason of reduction then depending, that it was not relevant to say that his father was *in fervore passionis* the time of the granting of the foresaid bonds to his daughter, but that he behoved to say that he was *in extremis*, he would have duplied, That his father was *in extremitate mortis*, which he also now propones to take away the bonds. The charger opposes her decreet-absolvitor, and would say no more. The Judges assoilzied from this new reduction, and find the letters orderly proceeded.

A&T. Gilmor.

Alt. Fletcher.

J. Hay, Clerk.

Eodem die.

S C O T contra S C O T.

RACHEL SCOT, being infest in liferent in some lands possessed by James Scot, pursues Francis Scot, as succeeding in the *vice* of James, who was decerned to remove, and who had, in obedience to the decreet of removing, left the lands void, and taken instruments thereon. *Excepted*, That he could not be found liable for the violent profits, nor as succeeding in the *vice*; because he offered him to prove, that he was infest in the lands long before the pursuer, and that the decreet of removing could not prejudice him, he not being called thereunto, and he had reason to take possession of his own whenever he could apprehend it. *Replied*, Noways relevant to propone this *in hac instantia*; because the pursuer was not obliged to know this infestment, because neither public, nor clad with possession; and he intruding himself *in possessionem vacuum*, and by collusion with the tenant removing, *dolo desit possidere*. The exception was repelled, in respect of the summons and reply.

A&T. Gilmor.

Alt. Wedderburn.

Brown, Clerk.

December 10. 1655.

N I S B E T contra W I L L O C K.

NISBET pursuing a removing against one Willock: *Excepted*, He could not remove, because he was tenant to one Hamilton, who was infest, and who was not called. *Replied*, That he could not be heard, because the ground of his decreet of removing is a decreet recovered against Archibald Hamilton, as lawfully charged to enter heir to the said Andrew Hamilton who was infest, (whereupon he led comprising, and was infest), and so there was no need to call that Hamilton, who was by process his author. *Duplied*, *Non relevat*, unless he would say that the said Andrew Hamilton is dead. *Item*, He offered to prove he was living. The Judges sustains the summons, in respect of the reply, the pursuer proving that Andrew was dead.

A&T. Trotter.

Alt. Balfour.

B

December

December 15. 1655.

M'CLELLAN contra RAMSAY.

M'CLELLAN pursuing Ramsay as heir, *et cæteris nominibus passivis*, to his father, for transferring of a bond granted by his father to him of the sum &c. and registrate against him in his lifetime; the defender comparing, denied he was heir; which was offered to be proven by the pursuer, in so far as he granted a discharge to my Lord Kirkcudbright of a sum due by my Lord to his father, wherein he grants discharge as heir. *Answered*, *Non relevat*, unless he would say, that he had gotten payment of that sum, which otherways he had never gotten, if he had not been apparent heir, *et alioqui successurus* to the creditor: For the granting of a discharge, wherein he is only designed heir, or apparent heir, is not relevant to make Ramsay liable to his father's debts, for he might have interest in that sum *titulo singulari*, though the bond be conceived in his father's name. This answer was repelled, in respect of the alledgeance made by the pursuer; thereafter the defender propones a peremptory, under protestation always that the same do not infer him to be heir or successor, but that he prove the same *prout de jure*; *viz.* giving, and not granting that the defender was heir, yet this bond cannot be transfered in him *passivè*, because this pursuer being the defender's tutor, had made payment of this debt of his father's, and had retired the bond from the creditor; likeas he, in his tutor-accompts, had given up this sum as paid by him. *Answered*, It is not relevant to take away a transferring, being but a partial exception not proven. The Judges decern the decret to be transferred, reserving his defences with the same manner of probation as if he were in an ordinary action.

A&S. Syme.

Alt. Heriot.

Downy, Clerk.

Eodem die.

IN an action of mails and duties, no necessity found to call any but the tenants; and the Master may compare, and desire to be admitted for his interest, which he must produce before he can be heard. It is otherways in a removing.

Eodem die.

A Minor being conveyen as intromitter with his father's goods, to make payment of a debt resting by his father; the libel being denied, it was offered to be proven, that Alexander Home, his tutor, had, *nomine tutoris*, meddled with such and such particular goods belonging to the defunct debtor, and that the tutor's intromission must be reputed his intromission. The Judges repelled the alledgeance, and assilzied the defender from the vice of intromission.

A&S. Hog.

Alt. Heriot.

*Eodem die.**MAXWELL contra his TENANTS.*

IN an action of mails and duties, pursued by John Maxwell of Dalswinton against his tenants, there compares one Elisabeth Roome, who was infest, and produces a reduction of that right made to the pursuer. The Lords prefers Maxwell *in hoc judicio*, but ordains the tenants to pay

L. 100

L. 100. sterling yearly to thir Roomes for their aliment, they finding caution to refund the money in case they succumbed in the reduction. This decreet being suspended by John Maxwell and his tenants, on this reason, That, since he was ordained to be answered of the mails and duties of the lands, it was iniquity to make him pay L. 100 sterling for aliment to thir Roomes during the dependence of their reduction; because, granting they should prevail therein, yet he being *bonæ fidei possessor, fructus perceptos facit suos*; and her decreet of reduction cannot be drawn back to the mails and duties uplifted from the tenants since the intenting of the reduction; nor can she nor her sisters have any right to these, but only to the mails, &c. that shall be found resting owing from the act of litiscontestation; and there was a practic alledged betwixt Ker and Alexander to that effect. This reason was repelled, and the letters found orderly proceeded, and the rather because the poor Gentlewomen, Roomes, had nothing to live upon. This is not unlike to the civil law, whereby *impensa litis parti pauperi adjudicantur solvi ab altero colligante*.

Eodem die.

RUTHERFORD contra Master of ROLLO.

JOHN RUTHERFORD, as assignee by James Naesmith, pursues the Master of Rollo for payment of 2000 merks, as the price of certain commodities received by the said Master, on an accompt. *Alledged*, No process, because, by act of parliament, all actions for accompts, furnishings, &c. are prescribeable within three years; *ita est*, since this accompt it is more than fifteen years. *Replied*, The prescription was interrupted by raising a summons, calling the party for payment of this same debt, and that within the years of prescription mentioned in the said act of parliament. This reply was sustained, and the Lords found process upon the said accompt, notwithstanding of the act of parliament.

A&A. Nicolson.

Alt. Fletcher.

Brown, Clerk.

December 18. 1655.

K E R contra M O O R E.

JAMES KER having charged Mr William Moore for payment of 3000 merks, promised by him in the name of tocher with his sister, conform to a contract of marriage, and of L. 1000 besides, resting by him by bond: He suspends, That he cannot be obliged in law to pay both the 3000 merks promised by him in tocher, and the other L. 1000 due by bond, as two distinct and several sums; because he not being bound in law to tocher his sister, and being only bound in the contract as taking burden for her, it must be presumed in law that the L. 1000 due by bond is a part of that 3000 merks contained in the contract of marriage, *cum debitor non presumitur donare*. Likeas, the charger's wife being *extra familia patris*, this L. 1000 was a part of her bairn's part of gear, and she was not able to instruct that he was *aliunde* debtor to her. This reason was not found relevant, but the letters were found orderly proceeded against the brother.

A&A. Gilmer.

Alt. Cheop.

J. Balfour, Clerk.

Eodem

*Eodem die.*Countess of *TWEEDDALE* contra TENANTS.

THE Countess of Tweeddale pursuing the tenants of Beltan for the mails and duties due by them of the crop 1653. *Alledged*, She as liferentrix could not crave the farms for that crop; because my Lord Tweeddale, who was fiar, lived the whole crop 1653, and died not till Whitsunday 1654, and so that year's farms belonged to my Lord's executors, and not to my Lady conjunct-fiar. *Replied*, The rent of this part of my Lady's conjunct-fee is silver-duty, which is not payable till the Whitsunday after the crop; and so, tho' my Lord lived the whole crop 1653, yet dying *ante eventum termini*, the half of that year's duty belongs to the liferentrix. The Judges repelled the exception, in respect of the reply, and found the Lady had right to that half year, and not my Lord's executors.

A&A. Nicolson.

Alt. Sinclair.

J. Balfour, Clerk.

This decision was altered, after farther hearing, and the contrary thereof determined.

*Eodem die.*Lord *BRECHIN* contra TENANTS.

MY Lord Brechin pursuing a poinding of the ground against some of my Lord Morton's tenants for the bygones of an annualrent. *Alledged*, They could not be poinded for bygones, because they had paid their Master for all bygones, and reported his discharge. *Replied*, The annualrenter behoved to have a decret for poinding notwithstanding of that discharge; because, by the law and constant practice of this country, the ground may be always poinded for the bygones of an annualrent; for, if a discharge by the Master to the tenant could stop a poinding of their ground, then all decreets of that kind might be eluded by collusion betwixt the Master and tenant, which were unjust. The Judges found no poinding against the tenants, nor their goods, in respect of the said discharge, but found the ground distrinziabie.

December 20. 1655.

MAITLAND contra THOIRS.

RICHARD MAITLAND pursuing Mr Thomas Thoirs a Minister in the West, for payment of 1000 merks Scots, promised and given in tocher to Mr Thomas with Isobel Maitland his sister, because the said Isobel died within year and day after the solemnization of the marriage; and so, by the law, the tocher-good returns to the executors and nearest of kin to the wife. *Alledged*, There can be no restitution of the tocher; because, tho' his wife died within year and day after he married her, yet there being a child gotten and born of the marriage, within that time, the tocher ought in law to belong to the husband, and not to any other. *Replied*, Noways relevant, unless he would say a living child was born within that time, and known to be so by crying. *Answered*, No necessity to say the child was living; for, tho' by the law the husband cannot claim the courtesy of Scotland, unless the child be born living, yet this consuetude cannot be extended to this case to transmit the right to the tocher to any other than the husband, tho' the bairn born did
never

never cry nor weep. The Judges found the exception relevant, and assigned a day to prove there was a child born, tho' dead, and that so the husband had only right to the tocher.

Eodem die.

Laird of TOUCH *contra* PATERSON.

AN exhibition being pursued by the Laird of Touch against Hugh Pater-son writer, of a minute of a contract of alienation passed betwixt the pursuer and one Ferguson, which was libelled to be depositate in the said Pater-son's hand to have been rectified, and on particular conditions not fulfilled; and, after exhibition, craving the same to be delivered to him to be cancelled. There was also exhibition depending at this Ferguson's instance against this Pater-son for exhibition and delivery of the said minute to him as his proper evident. *Excepted* by Ferguson, It cannot be cancelled, because it was his evident subscribed by him, and was only delivered to this writer to be extended; which he offered to prove by the depositar's oath. *Answered*, That since the evident was mutual and undelivered, the defender could not prove it to be his, but *scripto vel juramento partis*; and the depositar's oath is noways relevant in law to bind him to the performance of that which may take away his heritage. *Answered*, That since both pretended interest in the evident, and that neither offered to prove *scripto vel juramento*, the only legal probation was by the witnesses insert in the minute, and the communers betwixt the pursuer and defender. On the contrary, it was alledged to be only probable by the writer's oath, in whose hands it was depositate; otherwise all minutes given to writers to be extended should be elusory, and the rather because *res* was not *integra*, a part of the price of the lands sold being already paid. The Lords, after advising of the cause, found the depositating of a writ to be rectified on conditions, might be proven by the depositar and witnesses insert in the minute, and the communers betwixt them their oaths.

A.R. Wedderburn.

Alt. Fletcher.

Brown, Clerk.

Eodem die.

INNES *contra* DENNISTON, &c.

INNES of Cockston pursuing improbation and reduction of a bond, alledged granted by the Laird of Balvenie principal, and this pursuer's goodfire cautioner for him, to John Denniston merchant in Edinburgh, for 5000 merks, and assigned by John to the Lady Reidhouse, on this reason, That the bond, *quoad* Cockston the cautioner, is null, because there is only one witness insert and subscribing to Cockston's subscription, where the law requires two, *et singularis testis habetur pro nullo*. Likeas, the bond is false; because it bears Cockston to be subscribing at Auchincarty such a day, and it was offered to be proven that he was *alibi*; and that, ten years before the subscribing of that bond, he was not at the place designed therein, nor since; but that he remained in Cockston ten years before, and died there. *Answered*, That he had homologate the debt, by payment of the sum, and given order to one Innes of Douffie to pay the same, who had accordingly satisfied the defender. *Replied*, The homologation was on a belief that he was truly debtor in the sum, and that the bond whereon he was pursued was a true and valid bond; and *esto* he had paid it, yet having paid that which he was not bound to pay, *habet* by the law *condictionem indebiti*. Likeas, He

C

denies

denies that ever he gave warrant to pay the same, but that his agent, without his warrant, colluding with the Lady Reidhouse, (who gave him 500 merks for his pains) had given that sum to this defender; and that, on the contrary, he had given him order to purchase a suspension, on this reason of reduction and improbation, which, if he could not obtain without consignation, he gave him order to consign the same. The Judges ordained the defenders to condescend on the designation of the witnesses to Cockston's subscription, and to summon him, to the effect he may be examined upon the truth of Cockston's subscription, and the place where the bond is alleged to be subscribed by Cockston (which is the direct way of improbation); and if they failed betwixt and the day assigned, they ordained the pursuer to prove by witnesses that Cockston was *alibi* the time of the subscribing of that bond.

A&A. Nicolson.

Alt. Gilmor.

W. Dounie, Clerk.

Eodem die.

R U C K A R T S contra B U C H A N.

GEORGE and David Ruckarts, burghesses of Aberdeen, pursuing a declarator of the expiring of the reversion, against one Buchan, on a clause irritant contained in a contract of an improper wadset, wherein it was provided, that whenever George Ruckart the father in his lifetime, or David the son after his decease, should, forty days preceding any term of Whitsunday or Martinmas, require the said Buchan to make payment of the sum contained in the reversion, that he, in case he failed in the payment, should pay to the said George 2000 merks. And sicklike, in the said contract of wadset, it was declared, that, in case he should be required the second time, and that the defender failed in payment of the sum after requisition, that, in that case, he should fall from the right of the reversion, and the same should be declared to expire. Against this declarator of the failzie, on the first requisition and the expiration of the reversion on the failzie of the second, it was *excepted*, There can be no declarator on the failzie of the first, because, by the contract, the money contained in the reversion, is payable to George in his lifetime, and he has the only right to require; but so it is, the father, neither by himself, nor his procurator, ever required the money from the defender; *igitur*. *Replied*, The son, authorised by his father, required, and was present at the requisition, which was sufficient. *Answered*, The father, either by himself, or his procurator, ought to require, and the instrument ought to bear a procuratory from the father to the son, and that the notary did read it, which being wanting, the requisition is not lawful, as was found in the like case betwixt the Laird of Innerwick and Mr Maxwell. The Judges found no declarator upon this failzie, because the requisition was not lawful.

Then the pursuer insisted on the second, and it was *alleged*, No declarator on the failzie of the second requisition, because, by the contract, the pursuer was obliged to require twice the defender for payment of the principal sum, and so the order of the first not being lawful, the second is void. The Judges assoilzied from the declarator.

A&A. Gilmor.

Alt. Nicolson.

Eodem die.

WHEN the Judges ordain witnesses or parties to be examined *ex officio*, the ordinary Lord for receiving parties oaths is not judge to oaths of that kind; but ordinarily they are either examined *in presentia*, or before two of their number.

December

December 21. 1655.

— contra —

A Relict-executor being pursued for payment of a debt owing by her husband: *Excepted, absolvitor*; because the inventory of her husband's testament is exhausted by payment of true and lawful debts, and whereupon she has purchased exoneration *ante intentionem hujus causae*. This was found relevant. Then the pursuer offered to prove, that she promised to make payment. It was desired he would condescend *quando et quo nomine*, whether *proprio* or *executorio*; if *nomine proprio*, then relevant to be proven by oath of party; if *executorio*, it is not relevant, since the inventory is exhausted, *ut supra*. The Lords assigned her a day to give her oath, if she promised *nomine proprio*.

A&. Hog.

Alt. Dunmuir.

December 26. 1655.

BURROWS &c. *contra* the Earl of M A R.

THE agent for the whole boroughs of Scotland, the Solicitor-general, in name of the commonwealth, the heritors of Sauchie, with concurrence of a number of other Gentlemen and commons, in name of the people, pursues the Earl of Mar, and these who had comprised his estate, as heritors of the Pow of Alloa, and proprietors of the ground and way that leads from the coal-heugh of Sauchie, to the harbour or port of Alloa, to hear and see it found and declared, That the pow and port of Alloa being erected in a free Burgh-royal by King James in 1620, where all the lieges may repair for trade and commerce; and so the said port being free and patent to all, and the Laird of Sauchie, and others of the people being in possession without interruption these thirty years past, of that way which leads from the heugh of Sauchie to the said harbour, by carrying of coals, loads, and merchant-packs, and other deeds of community; and therefore to hear and see them decerned to have done wrong in interrupting the heritors of Sauchie to carry their coals from their own heugh to the said free harbour by that common high-way that leads from Sauchie to the town of Alloa: *Item*, to desist in all time coming from interrupting them in the use of of that way, and from hindering the said heritors to stack their coals on the pow of Alloa, conform to the custom of free burghs in Scotland. *Alledged*, That however this is pretended to be a popular action, and for the weal of the people, yet it was only intended for some few, and that the advocate for the commonwealth had no interest in this pursuit, being neither an improbation, contravention, nor a general declarator, and that his name was only used as a pretext to colour the wrong intended by some few. And as to the cause, it being properly a molestation, there ought to be libelled uninterrupted immemorial possession, at the least of forty years, which is the only time that can introduce prescription *rei incorporeae*, such as is *jus viae et actus in re aliena*, which possession is not here; for if there was any, it was either before Alloa was erected into a Burgh-royal or after; not before, because it is offered to be proven that that way was tilled and sown by the Earl of Mar as his own proper heritage; not after, because it was manured by him and his tenants without any interruption, and he was in use of debarring all others from making a common high-way there: Likeas, any way the Lairds of Sauchie were in use of, it was by the special tolerance and permission of the Earls of Mar, and by paction betwixt them, for payment

ment of so much yearly in the name of gate-mail, which the Earl is content to allow thir pursuers at the same rate. Likeas, they can never be heard to say, that that way was a common high-way; for, by the law, *via publica est qua fit a termino publico ad terminum publicum per medium publicum*: But so it is, this way leads not from a public part to a public *super solo publico*; and is, allenarly, *via agraria*, made for a footman or a horseman through his own ground, and was never *actus*, which is *jus agendi vehicula*; and therefore, can never be declared a public way. But if the pursuers will mend their libel, and say, that *de jure* the Earl of Mar ought and should make it such a high common-way as carts and wains may pass and repass from Sauchie to Alloa, they shall have an answer: But to libel upon the point of possession, and not to be special in the time, and how long, is altogether irrelevant. *Replied*, The pursuers offer them to prove that they were in possession, by carrying of packs of ware, driving of carts, and doing of other deeds, as in a common public way; and this pursuit must be sustained, being a servitude of such importance as *quilibet ex populo* has interest therein. Much more was said, but the case was not decided, and the parties were ordained to submit to Arbiters.

Eodem die.

L E V I N G S T O N *contra* B Y R E S.

ONE Levingston, as assignee by ——— who was one of the executors of umquhile Mr James Eiston, conveens Mr Robert Byres for payment of 1600 merks, contained in a bond granted by him to Elphingston the cedent. *Alledged* by the defender, That the true cause of the granting of this bond, was not for any sums of money he ever borrowed from this assignee or his cedent; but that he being debtor to the said Mr James Eiston, to whom the cedent was executor, he renewed the bond for the sum now charged for in name of the said Elphingston, which he referred to the charger's oath; and he cannot be decerned to pay the hails sums charged for, because he had paid 1000 merks thereof to Mr James himself, in his lifetime, to whom the charger's cedent was executor, and so cannot be liable in double payment thereof; especially since the bond was given after compt and reckoning, which is always understood to be *salvo justo calculo*, and it was given *ex errore facti probabili*, his papers having miscarried at the storming of Dundee. This was repelled against the assignee; yet the Commissioners ordained both cedent and assignee to be examined *ex officio*.

A&A. Nicolson.

Alt. Fletcher.

J. Brown, Clerk.

January 1. 1656.

J O N K I N *contra* Laird of S P O T.

ONE Jonkin pursuing the Laird of Spot, as heir to his father, for payment of his proportion of the sum of L. 5000, wherein his father was bound to the pursuer with some others, conform to a registrate bond, bearing this defender's father to be subscribing with the rest. *Excepted*, No process; because it being only the extract of a bond, which can make no faith against the defender, unless that his father had either consented to the registration thereof by his procurator, or that it had been registrate against him in his lifetime; but so it is, this extract bears not that any procurator consented to the registration for Spot; and so can be no ground of action against his heir, unless the principal was produced. *Alledged*, That, in the absence of the registers, it was miscarried. The Judges found the extract to prove, tho' there was

no

curator compearing nor consenting to the registration thereof, unless the defender would offer to improve the principal as false and feigned.

Adv. Norwell.

Adv. Gilmor.

J. Kello, Clerk.

Eodem die.

W I L L I A M S O N contra ———.

MARION WILLIAMSON pursuing a reduction of a comprising of her liferent of the lands of ———, provided to her by her contract of marriage, *super hoc capite*, That the ground of the comprising was a bond, granted by her *stante matrimonio*, and is null *quoad eam*, and cannot in law be a ground whereon to affect her liferent *post dissolutum matrimonium*, but is a debt payable by her husband and his heirs, and is no way obligatory against her. It was objected against the interest of the pursuer, That she had produced no title in her person to reduce this comprising, which ought to have been done *in initio litis*, and so cannot be heard to reduce. *Replied*, There is no necessity to produce her title or seisin to this defender; because he having comprised her liferent, has confessed her title to be good and valid; and he cannot pretend ignorance thereof, nor question the right of the same, since it is the ground of his comprising craved to be reduced. This was found relevant, and the pursuer's interest sustained without production of a seisin.

Adv. Maxwell.

Adv. Elliot.

J. Kello, Clerk.

January 4. 1656.

Lord B L A N T Y R E contra F E U E R S.

MY Lord Blantyre pursuing the Feuers of the Lordship of Blantyre for payment of the bygone abstracted multures, conform to his infeftment in the barony of Blantyre, mill, mill-lands, and astricted multures thereof. *Excepted*, No process against the Feuers; because the multures of the corns of the barony were always paid by the Tenants, and never by the Feuers. Likeas, they offered them to prove, that they have been in possession of their feus multure-free thir eighty years bygone. This is repelled, in respect of his infeftment, bearing thir words, *with the astricted multures*, which cannot be taken away by any possession, unless they could say they were astricted elsewhere, or that they have their infeftment multure-free.

Adv. Nisbet

Adv. Heriot.

Eodem die.

A Sheriff-principal has no power to discharge his depute to subscribe a decret, except he were sitting in judgment with the depute.

Adv. Nicolson.

Adv. Gilmor.

January 6. 1656.

Lord T W E E D D A L E contra his M O T H E R.

MY Lord Tweeddale, as assignee from his father, pursues the Countess of Tweeddale his mother-in-law, for delivery to him of certain bonds granted by my Lord Crawford, Eglington, and others, for certain sums of money borrowed by them from his father. *Alledged*, Thir bonds cannot be pursued for to be delivered, because these very bonds are assigned to the Countess by the Earl, for the provision of the children begotten of that marriage,

riage, and accordingly were delivered to her, and that the Earl had left her tutrix to the children begotten betwixt them. *Answered*, She, as tutrix, cannot be heard to alledge this; because the pursuer, by a testament posterior to the defender's, was left tutor to the said children, and yet he was content that the Countess should be curatrix *ad hanc litem*, and defend her children as she best might. And as for the assignation made to her, *1mo*, *Non relevat*, because never delivered in the cedent's lifetime. *2do*, It was *donatio causa mortis*, which in law is revokable; and it was revoked actually by a posterior assignation made by his father to him of thir same bonds for causes most onerous, which were specially condescended on. *3tio*, His assignation was intimate before the Lady's. *Replied*, The alledgeance is most relevant, notwithstanding of the reply; because this prior assignation, with the haill bonds and papers assigned, were delivered to the Lady by my Lord in his lifetime; nor can it be called *donatio mortis causa*; for the Earl was *in plena valitudine* when he made it, and it being for the provision of his bairns, is a cause onerous. As for the intimation, it is offered to be proven that the Lady's assignation was first intimate to some of the debtors, tho' not to all. Now this is sufficient in law, where there are many principals and cautioners bound together for one sum; for *jus debiti est indivisibile*: The Judges, after they had heard the cause *in presentia*, decerned the Countess to deliver the bonds to the Earl, and found that a donation or provision made by the father to his bairns is revokable at any time before his decease, and that it was *actu* revoked, by granting a posterior assignation to the pursuer; for they found not the first assignation delivered by the cedent, being only delivered to his wife, who is *una et eadem persona* with the husband.

A.R. Gilmer. Alt. Nicolson.

Eodem die.

MUSCHET contra COUPLAND.

A Suspension of double poinding being raised by Adam Muschet, against Coupland and Thomas Morton, on a reason of double distress, and consignation of the sum. *Answered*, The letters must be found orderly proceeded, notwithstanding of the reason; because Coupland the charger being made assignee, by one called Harper Coupland, to this sum resting by Muschet the suspender, and this Muschet having renewed the bond to this charger (who is assignee thereto) any pretended arrestment made by Morton, as a creditor of Harper Coupland the cedent, could never meet the bond granted by the suspender, *nomine proprio*, to this charger; and he was *in mala fide* to suspend and consign the sum resting to him. *Answered*, This bond, charged on, was allenarly a bond in corroboration of the former granted to the cedent, and the arrestment was prior; and so the first not being extinct by this other (it being only corroborative thereof,) Thomas Morton was *in bona fide* to arrest, and the suspender to suspend, &c. The Judges sustained the arrestment, and assoilzied the suspender.

A.R. Nicolson. Alt. Wedderburn.

January 10. 1656.

HAMILTON contra PRESTON.

JOHN Hamilton, Apothecary, pursuing George Preston of Valleyfield, as heir or successor *tit. lucrati. et cæteris nominibus* to his father, who was cautioner for John Earl of Mar in the sum of — to this pursuer, as assignee by

by —. *Alledged*, No process as heir, &c. to this pursuer, because there is an elder brother yet living, who is the only man conveyable as heir to his father for payment of this debt, and who ought to be first discussed. *Answered*, His elder brother was an idiot, and his father had disposed his whole estate to this defender in his lifetime, and had adopted him to be his son and heir; and so, albeit he was not that person who was heir, yet being successor *tit. lucrat. post cont. deb.* he ought to be liable in payment of his father's debts. *Answered*, That successor *tit. lucrat. &c.* was only libelled against him who was *alioqui successurus*; but this defender is in the case of a singular successor, who, upon that ground, could never be conveyed for payment of his father's debts, no more than a stranger who had bought the land; and if his father had disposed his estate to him in defraud of his lawful creditors, they had a remedy prescribed by act of parliament, *viz.* to reduce. This alledgeance was repelled, and George the second son found liable for the debt. This decision is contrary to the practice used in such cases, albeit there may be much spoken for the equity and justice thereof.

This interlocutor was thereafter rectified, and the defender assolizied.

Act. Nicolson. Alt. Wedderburn.

Brown, Clerk.

Eodem die.

SCOT contra WYLLIE.

IN the process, Adam Scot, against a woman called Wyllie, it was found, that valued bolls are *debitum fundi*; and that a liferentrix is liable in payment thereof, even for the years and crops possessed and intromitted with by her husband; and that it is in the titular's option, either to pursue the heirs and executors of the husband, or the relict, *hoc maxime attento* that the husband only possessed *jure mariti*, she being a widow when he married her. In this same process it was found, that where stock and teind is destroyed and eaten up by men and horse *vi majore*, the heritors are not liable in payment of the teind.

Act. Maxwell. Alt. Syme.

Hay, Clerk.

Eodem die.

LOGAN contra GALBRAITH.

A Woman being pursued to remove, propones this defence, That she is cognosced to a terce of that land, and so cannot be decerned to remove from the whole tenement, but only from two parts thereof, a third belonging to her of the law *jure relicte*. *Answered*, A house or tenement of land is *indivisible quid in jure*, and a woman cannot have a third thereof. This answer was repelled, and the woman found to have right *ut supra*. If it was a tenement within burgh, it was *male judicatum*; for both Craig and Skeen shew there is no terce in burgage.

Act. Gilmer. Alt. Nicolson.

Brown, Clerk.

Eodem die.

MUSCHET contra COUPLAND.

IN the foresaid double pointing betwixt them, it was alledged the suspender was *in mala fide* to consign on Morton's arrestment, because long after it, he had granted this bond, *nomine proprio*, to Coupland the assignee, and entered in payment with him of a part of the principal sum, and so, after the arrestment, having transacted with Coupland, *lis erat finita*, and he was wholly

wholly become debtor, and the prior bond extinct. This was repelled, and the arrester preferred *ut supra*.

Partibus ut supra.

January 10. 1656.

K E L L O *contra* Earl of L O U D O N.

ONE Kello pursuing the Earl of Loudon for payment of the maills and duties of two tenements of land lying in Newmills, and of the tower of Mauchline. *Alledged*, The Earl was not in possession of the saids tenements nor tenant to the pursuer; and if any be liable, it is the tenant, and not the Earl. *Item, Alledged* for the Lady Glenurchie, who is present tenant, That she bruiked by virtue of a nineteen years tack-set to her by this Earl of Loudon, and had made payment of the bygones of the tack-duty, and so could not be conveened therefor. And then Mrs Naesmith compeared and produced her interest, and alledged, That she ought to be preferred, because any right the pursuer has is but a base right, flowing from the Earls of Loudon, never clad with possession; and she was publickly infest in the said tenements and tower, by virtue of a comprising led at her instance, against the Earl, long before any possession he could pretend. This was sustained.

Ad. Nisbet. Alt. Nicolson & Gilmor.

Eodem die.

POSSESSION of one or two houses of a tenement, is reputed to be possession of the whole; but it is otherways, if they be distinct tenements. Likeas, a tower or fortalice will not come under the name of part and pertinent.

Eodem die.

AN executor pursuing for payment of a sum from the defunct's debtor, there may be compensation proponed by the debtor against the executor, which is as competent as if it were against the testator's self; and this compensation will, in law, liberate the executor *pro tanto* at the hands of all parties having interest. *Mr Gilbert Johnston against the Earl of Had-dington.*

Ad. Sinclair. Alt. Syme.

Eodem die.

— *contra* —

A Reduction *ex capite inhibitionis*, being pursued by — against — of all dispositions made by the father in his lifetime in favour of his son; because the father long before was inhibited at the pursuer's instance upon a debt owing by him, and for which he had dependence against him, and whereon he has recovered sentence against the son. *Replied*, The defender ought to be assoilzied, because the ground of the inhibition, being a naked dependence, whereon no sentence followed in the lifetime of the father, the same is null, and all that followed thereupon, and being a personal deed, is extinct with him against whom it was raised. Neither can the inhibition with the dependence be transferred, because it is but a citation whereon no litiscontestation followed. The Judges assoilzied from the reduction.

Ad. Heriot. Alt. Rolfe.

Eodem die.

Eodem die.

IN a suspension of double pointing, whereon consignment has followed, the suspender, at the discussing of the suspension, ought to be free and assolizied, and the parties may reason about their preference. Likeas, by an act of sederunt, there can be no arrestment made, either in the clerk's or treasurer's hand after the money is consigned. In this case, there were several parties contending for preference to the money consigned by Alexander Cockburn of Popill, in whose hands it was arrested by one John Buchard. *2do*, By Richard Guthrie, and then one Hamilton of Eleiston: For the money consigned was due by this Cockburn to Capt. Home, who had married the heiress of Samuelston, and who had assigned it to John Young the charger. *Alledged*, by Buchard, That he ought to be preferred, because she had arrested the said sum in the suspender's hands; which arrestment, tho' posterior to the assignation and intimation thereof, yet the assignation being for the cedent's behoof, (which he offered to prove by a missive under the cedent's hand), he ought to be preferred to the assignee. *Alledged* by Guthrie, That he, on a bond granted by Samuelston, and a decret recovered against Capt. Home's wife as his heir, had arrested the same money long before the assignation, at least before its intimation; and so that he ought to be preferred both to Buchard and the assignee. The third *alledged* also arrestment before intimation, &c. *Answered* to all the three, That the arrestments were loosed. *Replied*, The loosing *non relevat* to liberate the debtor, nor to seclude them from preference to the assignee in the said sum; because the arrestment is loosed by finding the very debtor (who is the suspender's cedent) cautioner; for this way of assigning of bonds, and loosing of arrestments, is elusory and frustrates the meaning of the law, which provides that parties shall be farther secured in loosing of arrestments, by finding new caution; which in this case is not done, and is in effect a mere cheat. This was desired to be heard *in presentia*.

Adv. Dalrymple.

Adv. Maxwell.

Eodem die.

WHEN a compriser is satisfied within the time of expiring of the legal, by intromission with the maills, &c. there is no necessity to use an order of redemption, or to raise a declarator thereon, but allenarly to call the compriser to a declarator of payment by intromission with the maills, &c.; for, by the act of parliament, it expires *ipso facto*. Likeas, to a declarator of redemption, it is sufficient the apparent heir be called, because it is a real action.

January —. 1656.

HAMILTON *contra* TENANTS.

JOHN HAMILTON, as having right from Douglas, pursues the tenants of Spot for payment of their maills, &c. to him, conform to a contract of wadset of the lands of Spot made to his author, under the reversion of the sum of —. The heritor compares, and *alleges*, That there could be no action on this infestment of wadset; because, Douglas, the pursuer's author, did, by a renunciation and grant of redemption, discharge it. *Replied*, The renunciation is null, not being registrate within sixty days, conform to the act of parliament. *2do*, The pursuer's author's infestment being but a base one, holden of the disponent, he

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might

might validly resign the same into the superior's hands *ad perpetuam remanentiam*; which he accordingly did, and so consolidated the property with the superiority, conform to an instrument of resignation produced; and so, he having fully denuded in favours of the superior of this his infeftment, any right the pursuer has flows *a non habente potestatem*. *Answered*, An instrument of resignation of a wadset-right, in the superior's hands *ad perpetuam remanentiam*, was not *habilis modus* to denude the wadset-receiver in prejudice of the pursuer, who *bona fide* bargained with him, as one that had a right, and who might very well pretend ignorance of that instrument of resignation, it never being made public by registration, as it ought to have been, conform to the act of parliament anent the registration of reversions, assignments thereto, renunciations, &c.; for, if this instrument of resignation be sustained as the *habilis modus* of denuding parties infeft in prejudice of a third, it would elude the meaning of the act of parliament, which is made *ad hunc effectum*, to prevent cheats and frauds of this kind. Likeas, of the law *eadem solemnitates requiruntur ad dissolvendum, que ad contrahendum requiruntur*: But so it is, to the confirmation of an infeftment of wadset, there is a necessity for the registering the seisin, to the effect the same may be public; even so to the dissolving of the wadset once lawfully constitute, and made public, as said is, there is a necessity of doing some deed whereby the same may be made public to the whole lieges, that none pretend ignorance thereof; which is not here done. This was a case so singular, and of so universal concernment, that it was heard *in presentia*.

A&A. Nisbet.

A&A. Gilmour.

J. Hay, Clerk.

January —. 1656.

ALEXANDER *contra* WINDERHAME.

ELISABETH ALEXANDER, and Wachop her spouse, charging John Winderhame, as heir to his father, to employ 18,000 merks to her in liferent, conform to the contract of marriage past betwixt the said Elisabeth and his father, the said John suspends, by finding Mr George Winderhame of Liberton caution; whereupon the said Elisabeth having obtained protestation, charges the said Mr George as cautioner for implement of her contract of marriage; who also suspends, by finding Mr Samuel Johnston cautioner; and Elisabeth having obtained decret against the heir of Mr George, she pursues Mr Samuel his cautioner for employment of the 18,000 merks, and produces no more but only the decret obtained against Liberton's heir, who was cautioner in the first suspension. *Alledged*, No process against Mr Samuel, till the charge, protestation, and act of caution recovered against his principal Mr George, were produced; for the decret against the principal cannot prejudice him of his defences, he not being called thereto, and not having seen the instructions thereof, whereon it proceeded. The Lords ordained the pursuer to produce the instructions above written *ante omnia*.

A&A. Nisbet.

Reus Gilmour.

Eodem die.

Laird of STEVENSON *contra* TENANTS.

THE Laird of Stevenson pursuing his tenants for payment of their tack-duty. *Alledged*, They are tenants to him by virtue of a tack standing betwixt him and them, for payment of a tack-duty, which is less than this charged for; and they are content to pay the tack-duty which is contained in the said tack, without any process. *Alledged* for the pursuer, That notwithstanding

notwithstanding of the said tack-duty, they have been in use to pay to him thir fifteen years past the tack-duty libelled for. The Lords found this superadded duty probable only by writ or oath of party. It was alledged they had received discharges from their master, containing a greater duty paid to him by them than what is in the written tack; and therefore it was craved they might produce these discharges. This the Judges ordained them to do.

Ad. Gilmor.

Reus Gilmor.

January —. 1656.

MASTERTON contra LIVINGSTONES.

IN an action for proving of the tenor of a bond, pursued by James Masterton against the heirs and executors of William Livingston, *alledged*, No process against the executor, because the inventory of the testament was exhausted, and so he exonered. *Answered*, This exception is no way competent in an action of this nature, being neither for payment of sums of money, nor for doing any deeds whereby he may be prejudged; which the Lords found relevant; but reserved this exception for the executor when execution shall be craved on the bond, whereof the tenor is now desired to be proven. *2do*, *Alledged*, No process, because he must first condescend that the bond was his, and that it was lost; which the pursuer did.

January —. 1656.

Minister of CROMARTY contra FARQUHAR.

THE Minister of Cromarty, pursuing Sir Robert Farquhar to pay fifteen bolls of victual, conform to a decreet of locality obtained by him in 1649, before the parliament. *Alledged*, The decreet is null; because, to the establishing of a locality, there is required a valuation, and to the leading of a valuation, it is necessary to call the heritors *per expressum*; *ita est* he being then heritor, was never cited. *Answered*, Any right he had to the parish of Cromarty was but a comprising, not clad with possession at that time; and so the minister was not obliged to know it. Likeas, he had called Sir Thomas Urquhart who was then in possession, by uplifting of the maills and duties, as apparent heir to his father, and cited all others generally at the parish-kirk door; and so this defender can pretend no ignorance of the minister's augmentation. Likeas, it was craved he would condescend wherein he was lesed by the valuation, he being heritor of the haill parish, which he could not instruct, since the same was far within the worth of the rent of the lands; and in valuations led that year 1649, the custom was, for the minister to give in a rental, according to which the locality was established; which rental was always referred to the heritors oath; and if they were absent, they were holden as confest. Then Sir Robert offered to prove, that the minister could not pretend ignorance of his being heritor, because he was his tenant, and laboured a plough of land under him, and paid him maills; all which he referred to his oath. The minister referred it to his oath; that he knew of this process of augmentation, and that he told him of it. The Judges ordained the minister to be answered, he proving Sir Thomas to have been in possession.

Ad. Wedderburn.

Alt. Nicolson.

January

January —. 1656.

HAMILTON contra the Lady SPOT.

IN the said above-written action, it was *alleged*, That acts of Parliament were *stricti juris*, and could not be extended beyond the literal sense; and that the said act comprehended only renunciations, &c. and noways resignations, the registration whereof no act of parliament ordains. Likeas, it were absurd to draw from the parity of the reason of the act of Parliament anent registration of feifins and reversions, that because assignations to reversions should be registrate by act of parliament, that therefore comprisings of reversions should be also registrate. Sicklike *alleged*, That if a procuratory of resignation, and renunciation following thereupon, be *habilis modus* to take away an heritable and irredeemable right standing in any man's person, why not of a redeemable right, as a wadset or annualrent. And, because the pursuer *alleged* that the procuratory produced bears a renunciation and grant of redemption, and that a discharge of the reversion is principally intended, and not a resignation, but as *quid accessorium*. *Answered*, The renunciation and procuratory of resignation are *jura distincta*, and that the defender made no use of his instrument of resignation, in so far as it contains a renunciation, but only in so far as it is an instrument, which is not the worse that it be joined with a renunciation, *nam utile per inutile non vitiatur*. The Judges repelled the exception founded on the instrument of resignation, in respect of the act of parliament, and found it not *habilis modus* to take away a wadset.

A.R. Wedderburn.

Alt. Nicolson.

January 27. 1656.

SCOT contra SCOT.

SIR John Scot having disposed his estate to Sir James his Son, and the heirs-male gotten of his body, which failing, to return to the disponer and his heirs-male, pursues reduction of a bond granted by the said Sir James to John Scot his own brother's son, failing of his own sons, as done *in lecto aggritudinis*, in prejudice of the reducer, who is immediate heir of tailzie to his own son Sir James; and the heirs-male begot of his body. *Excepted*, No Process, because the Defender being a minor, and Sir John's own oye of his second son, his tutors and curators behoved to be summoned. Likeas, Any citation there is, it is not at the market-cross of the head burgh of the shire where the minor dwells. *Answered*, It was so, and if otherways, then let him reduce the execution as being *alibi*, which is *nullitas facti*, and he shall have an answer. 2do, *Alleged*, The defender being a minor, *non tenetur placitare de hereditate*; and the pursuer being the defender's own tutor, he cannot pursue him, unless some others be authorised to maintain him. Likeas, Sir John had behaved himself as tutor, by giving warrant to some in his name to intromit. *Answered*, This process was not of heritage, but for reduction of a bond; and he was content the rest of the co-tutors should authorise the minor *in hac lite*; and any accepting of the tutory by him was with exception of this action of reduction. *Answered* to this, That a tutor cannot but exercise *in solidum*, and is not divided in his office. This was repelled. Then *alleged*, The pursuer, as apparent heir, can have no interest to reduce this bond, there being two sons yet on life belonging to Sir James, who are in the tailzie before him; and so being the remotest mediate apparent heir of tailzie, he can have no interest to reduce this bond. The Judges found not his interest to reduce sufficient; yet being joined with

with the immediate, viz. Sir James his eldest son's concurrence, it was sustained, and then the defender protested for an incident diligence, before they could satisfy the production ; which was granted.

Eodem die.

STEWART contra CARMICHAEL, &c.

SIR William Stewart having arrested 20,000 merks, owing by Sir Daniel Carmichael and Sir John Chieslie, to Alexander Maxwell of Dalry, conveys them to make it forthcoming. *Alledged*, That they could not be decerned to pay the said sum ; because Alexander Maxwell, to whom they are debtor, is not bound to pay the sum but at Whitsunday 1656 ; and so the term of payment not being come, he cannot call to make them forthcoming before that term ; *quia plus petit qui ante diem petit*. This was repelled, but the Judges superseded the execution of the decret till the term of payment were both come and bygone.

A&. Norvell.

Alt. Ellies.

Hay, Clerk.

Eodem die.

SINCLAIR contra his TENANT.

SIR Robert Sinclair pursuing a removing against his own tenant, *alledged*, the warning is null ; because not conform to the order set down in the act of parliament, which is, that a copy should be left on the ground of the lands : which was repelled, because the tenant was personally apprehended. Then *alledged*, He was a rentaller, and so being a kindly tenant and willing to pay duty, he cannot be removed. This was sustained.

A&. Sinclair.

Alt. Norvell.

Kello, Clerk.

Eodem die.

DICKSON contra ———

UMquhile George Dickson of Hartree having lent 6000 merks to the Laird of ———, and assigned the same to two of his children of the second marriage, he, *ex post facto*, gives a declaration under his hand, declaring 1200 merks of this 6000 merks to belong to William Dickson's bairns, his own nephews, and ordains them to get payment from the debtor of so much thereof. John Dickson dies, and his brother's bairns pursues his heirs and executors upon that his declaration, to pay this 1200 merks. The heir *alleges*, No process against him, because the declaration ordains the debtor to pay it, and not him. The debtor *alleges*, he cannot be *in tuto* to pay his bond, being assigned and intimate to him in the cedent's lifetime. The bairns of the second marriage *alledged*, they could not be decerned to pay it, because the bond was totally assigned to them without any defalcation, and the same intimate. The Judges, after *avisandum*, decerns John Dickson's son and heir to pay this 1200 merks, conform to his father's declaration.

A&. Fletcher.

Alt. Harriot.

January 28. 1656.

DURHAM contra DURHAM and her Spouse.

SIR Alexander Clerk having given 7000 merks in tocher with his daughter to Mr James Durham of Pitkerro, her husband, and Mr James taking

an infeftment of an annualrent out of his lands, payable to the said Mr James, and Alifon Clerk his spouse, the longest liver of them two in liferent, which failing, to any of the said Mr James, and Alifon their bairns, as the said Alifon should please to leave it; conform thereunto, Alifon, with a disposition under her hand, disposes 4000 merks of this 7000 to Marion Durham her daughter, and the other 3000 merks to Grizel another daughter, and delivered the securities of the whole 7000 merks to Grizel; whereon Marion, and her spouse, for his Interest, pursues Grizel and her spouse for exhibition of this holograph right made by the mother to the two daughters. Mr John Fletcher, spouse to Grizel, *alledged*, He could not exhibit that right; because it was intrusted by his mother-in-law to him, and wherein he had not only interest by his wife, but also Mr James Durham had his liferent, who is not called; for *quorsum* call ye for exhibition, if it be not either to have it delivered to you, or to have the double of it for your security? To call to the effect it may be delivered to you, ye cannot, because the heir of the granter of the bond is not called, nor Mr. James Durham who liferents the sum; and for doubles thereof, I have given you authentic transumps of that right, to be kept by you for your security. The Judges discerned Mr John Fletcher to exhibit, reserving his defences against delivery.

A^c. Dalrymple.

Alt. Nicolson.

Eodem die.

B O R T H W I C K *contra* B O R T H W I C K.

A Declarator of redemption being pursued by James Borthwick, as heir to William Borthwick, who was, by a precept of seisin under the defender's father's hand, served and retoured heir to William Borthwick, to whom the reversion of his lands craved to be redeemed was granted by the defender's goodfere. *Alledged*, He had no interest to pursue this redemption; because the precept of seisin is not an active title *ultra* the lands therein contained. *2do*, The reversion is granted to William's heirs of line; *ita est*, that, by the charter and precept produced, it is not *constat*, that the pursuer is heir of line. *Alledged*, The order is defective, and no redemption can be pursued thereon; because all orders of redemption, and declarators raised thereon, ought to be execute at the market-cross of the head-burgh of the shire, where all parties having interest ought to be cited. *Answered*, *1mo*, Though the reversion bear to be granted to the heirs of line, yet the pursuer producing a precept of seisin bearing his goodfere to be heir served and retoured to him, in whose favours the reversion is granted, he is presumed to be heir of line, unless ye take it away, by a reply, that he is heir of tailzie or conquest and provision. And for the order, it is not necessary to summon all parties having interest at the market-cross, &c. seeing the defender, who has only interest, is personally apprehended; and there is no positive law ordaining the same, nor a decision of any Judge for its necessity. *Duplied*, Though a precept of seisin bear the pursuer's author to be heir served and retoured, and that the seisin is granted by the defenders authors, yet the pursuer ought to produce the said service and retour, it being his own evident, when it shall appear that the pursuer's authors are not such persons as have a right to this reversion. *Duplied*, for the order, *1mo*, There are many things in practice for which there is neither written law nor decision, but consuetude, as that in an action against minors, the tutors and curators should be summoned at the market-cross of the head-burgh of the shire where the minor dwells, and that order *in judicialibus* is essential, and to recede therefrom, is to recede from law. The Judges craved to hear this *in presentia*.

See this decided in Durie, June 4. 1631, Christie *contra* Jack.A^c. Nicolson.

Alt. Gilmore.

Kello, Clerk.

Eodem

Eodem die.

KENNEDY *contra* Lady SCOTSCRAIG.

KENNEDY pursuing the Laird and Lady Scotsraig, as heir and executor *respectively* to the Laird of Scotsraig, who was due by bond to the pursuer 3000 merks. *Alledged* for the Laird, He as heir could not be conveyed to pay his father's debt; because, though he had entered heir, yet he had no benefit there, but only invested him with his father's estate, to the effect he might denude himself in favours of his father's creditors, and the procuratory he had granted for serving him heir was with that express condition, that both his own personal and real estate might be free. *Answered*, *Additio hereditatis* is *actus purus, qui nec admittit diem, nec conditionem*. The Judges repelled the alledgeance, and decerned the heir to pay the sum.

A&. Gilmor.

Alt. Nicolson.

Balfour, Clerk.

Eodem die.

MONRO *contra* M'LEAN.

MONRO of Foullis, as tutor to——. pursuing one M'Lean for delivery to him of a discharge granted by——. *Excepted*, As tutor, he could not pursue, because he was *functus officio*. *Replied*, Though the office of tutory cease *quoad* the exercise of it, yet not *quoad* its consequences, *viz.* the *actio directa tutelæ*; for he being called to an accompt by his pupil of his intromission, he behoved to have this discharge to instruct the same.

A&. Gilmor.

Alt. Wedderburn.

Eodem die.

ONE being conveyed to pay 3000 merks contained in his own bond: *Alledged*, No process, because no bond produced to verify the debt. *Replied*, It was referred to his oath: then he asked *quo nomine* he conveyed him; whether as principal or cautioner? for, as cautioner, *nullo modo relevat* to be proven by his oath, whether he be cautioner or not, because his oath cannot work him relief against the principal: which was sustained.

A&. Heriot.

Alt. Syme.

Eodem die.

H O M E *contra* H O M E.

SIR John Home of Crumstain, pursuing declarator against the Laird of Renton, and to hear and see it found and declared, that he is satisfied of all sums of money, principals, annualrents and expences, for which he had comprised the lands of Manderston, and that his comprising is extinct, by intromission with the mails and duties of the lands comprised, before the expiring of the legal, as assignee from William Home the heir of Manderston, to whom the legal reversion is competent. *Alledged*, No process; because no interest produced, but only an assignation from him who had no right, and they denied there was any such comprising at Renton's instance; for this action being, in effect, a reduction of a comprising, the production must be first satisfied. *2do*, The pursuer has no interest to follow forth this action, being neither heritor of the lands, nor having right to the reversion; because there are interjected comprising betwixt Renton's comprising, which being prior to Renton's, were not satisfied within the seven years, and so the legal reversion is expired, and no way competent to the party from whom the lands were comprised;

comprised ; so the pursuer ought first to intent declarator against the interjected comprisers before he can convene Renton. *Replied*, Renton cannot be heard to object this, seeing it is offered to be proven that he is satisfied within the years of the legal : And this action is not to establish any right in the pursuer's person, but only to declare Renton's apprising extinct by payment, and when he had discussed him, he would quarrel the other compriser's right. 3¹⁰. *Alledged*, The libel *non relevat*, when it says, that he might have been paid by intromission with the mails and duties, &c. because it is in the option of the compriser, either to intromit or not ; and it must be libelled, that he actually intromitted. *Answered*, He offered to prove he actually intromitted. The Judges assigned a day to prove the summons.

A&A. Gilmer.

Alt. Nisbet.

February 12. 1656.

E L P H I N G S T O N *contra* —

MARY ELPHINSTON, relict of — burghers of Glasgow, pursuing her tenants for payment of mails, &c. to her; compared her husband's heir, and *alledged*, that she, not being infest in the lands, can have no right to the same; because *nulla sasina, nulla terra*: She opposes her contract of marriage, and provision therein contained; which the Lords found a sufficient title against the heir without seisin.

A&A. Maxwell.

Alt. Gilmer.

*Eodem die.*C A R L E T O N *contra* Earl of BUCHAN.

CARLETON Englishman, pursues the Earl of Buchan, as heir *et ceteris nominibus passivis* to his father, to pay 18,000 merks. It was craved, the pursuer would condescend, what heirship-goods he meddled with; for, if that were done, it was offered to be proven, that the deceased Earl of Buchan was such a person, as could have no heir, being neither prelate, baron nor burghers: And as *successor tit. lucrat. &c.* it was offered to be proven, that his father was denuded in favours of the Earls of Rothes and Kinghorn, for causes onerous, long before the contracting of this debt. *Answered*, The disposition made to Rothes, &c. was fraudulent, and was to the Earl's own behoof; who since had resigned his estate in favours of this Earl, now defender. The Lords desired to hear this *in presentia*.

A&A. Wedderburn.

Alt. Gilmer.

*Eodem die.*D O U G L A S *contra* her Husband's P A R I S H I O N E R S.

I N the cause, Isobel Douglas, relict of the minister at Baderole, against the parishioners, it was found, that she had right to a part of the annat, tho' she was only his wife twenty weeks: Nor did they regard that a woman, by the law, can have no right to any thing belonging to her husband, unless there be either bairns got of the marriage, or that it stand year and day after its solemnization; and that a minister's relict can be in no better case than another man's relict, who by the law reaps nothing of her husband, if the marriage dissolve within the year. All this was repelled, and the minister's relict, tho' but few weeks married, by the act of the General Assembly made at Montrose 1587, ought to have share to the right of the annat.

annat. Likeas, the relict and bairns were found to have full right to the whole subsequent year's stipend, if the minister die after Michaelmas, without any confirmation; and that the minister's bairns have their share, without being made liable to their father's debts; and the annat is repute a free donation to the minister's wife and bairns, conferred on them *misericordiæ causa*; yea, here, the bairns were preferred to the executor-creditor, comparing and disputing for preference.

Aët. Dalrymple.

Alt. Wedderburn.

This decision was in the English's time; but I suspect the Lords has altered the same since the King's restitution.

Eodem die.

UDNEY *contra* RICcart.

THE Laird of Udney against Riccart, and Riccart against Udney, pursuing mutual actions of contraventions of lawborrows, and both libelling right, and immemorial possession, to the lands controverted, and being both *in libello*. The Judges assigned to them both a day to prove their right, and possession, before they would give answer to the deeds of contravention.

Aët. Gilmer.

Alt. Gilmer.

Eodem die.

IN exhibitions, where the writs craved to be exhibit are referred to the defender's oath, the custom is, that exceptions against the delivery, reserves of the law, and the parties oath, must be first advised, before they can reason on the delivery.

Eodem die.

Lady CAPRINTON *contra* TENANTS.

THE Lady Caprinton pursuing her tenants for maill and duty to her, as infest, on her contract of marriage, in the lands libelled provided to her by her husband. Compears Anna Cunningham, (the cause was a double poinding), and *alleges*, She ought to be answered thereof; because she is in infest in the lands upon a wadset granted by Caprinton, containing a back-tack-duty, which was clad with possession, in so far as the Laird being back-tacksman, paid her yearly her annualrent, and which wadset is prior to this liferent-seisin. *Answered*, That Anna's right is but a base right never clad with possession, and cannot be preferred to her, who is infest, and in possession before her, and all that Anna has is a personal action against the heir of Caprinton, for payment of the back-tack-duy. This was repelled.

Aët. Heriot.

Alt. Wedderburn.

Eodem die.

ERSKINE *contra* her TENANTS.

LADY Mary Erskine pursuing for mailles and duties, compears John Ramfay, produces his interest, and craves to be answered before her; because the ground of her infestment is a comprising led by her against the Earl of Buchan, which comprising follows upon a decreet of poinding of the

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ground

ground for the bygones of annualrent, wherein the Lady Mary stood infeft by a bafe right flowing from her father, never clad with poffeffion till 1652; and to which decreet of poinding, the heritable poffeffor behoved to be called; which was not done. *Answered*, That James Ramsay, the fon, was called to that decreet of poinding, he then ftanding heritably infeft in the land, and being in poffeffion natural, and is compearing and proponing defences on his right. *Replied*, What his fon did, cannot prejudge him; becaufe he offered him to prove, that any right his fon had, was with refervation of his liferent; and that he was but his tenant, and fo the purfuer behoved to call the father. This was repelled, and the Lady ordained to be answered and obeyed.

A&t. Nicolfon.

Reus Nifbet.

Eodem die.

F A R Q U H A R contra M A C K E N Z I E.

S I R Robert Farquhar purfuing Simon Mackenzie of Lofun, to pay to him 1000 merks on a miffive letter, wherein he defires Sir Robert to forbear execution againft —, and he promifed to fee him paid. *Alledged*, The letter is noway relevant in law to infer payment againft him, being only a compliment, and a promife to endeavour to get Sir Robert paid. This was repelled, and Simon decerned to pay the fum libelled.

A&t. Trotter.

Alt. Wedderburn.

Eodem die.

I N the cafe of one Alexander, it was found that a fervice is a fufficient title to purfue a reduction and improbation, if the retour be produced *cum proceffu*.

A&t. Maxwell.

Alt. Gilmer.

February 18. 1656.

H A R R O W contra D I C K S O N.

D I C K S O N being purfued by Harrow, as executor to her mother, to pay 500 merks, wherein her mother was bound conjunctly with one Ramsay. *Alledged*, No procefs for the whole fum; becaufe it is offered to be proven, that 200 merks thereof was paid; and for the remainder, no procefs on the bond, becaufe not being purfued within forty years, it prefcribes. *Replied*, That a part of the fum being paid within the years of prefcription, it faves the bond from prefcribing; and partial payment is a relevant interruption of the law. *Answered*, Nothing can interrupt prefcription but a citation of the party before a Judge, which is not done, or an extrajudicial requifition of the fum within the years of prefcription. This was repelled, and the partial payment fufained to interrupt prefcription for the reft remaining unpaid.

A&t. Syme.

Alt. Sinclair.

February 21. 1656.

— contra —

A N English foldier having made a teftament, wherein he nominate another foldier his legatar and intromitter with his goods, without mentioning his executors, it being fubfcribed by another foldier for him, becaufe he could not write himfelf, it is craved to be reduced at the neareft of kin's inftance as null; becaufe neither fubfcribed by the teftator,
nor

nor by a notary at his command. *Answered*, It was a privileged testament, being a soldier's, who of the law is not tied to solemnities. *Replied*, He was no soldier the time of his making the said testament, and it was offered to be proven he was reduced. Which reply was sustained, and a day assigned to prove.

A&A. Heriot.

Alt. Elliot.

February 22. 1656.

IN a Reduction, this exception is competent; All parties having interest are not called, *viz.* the granters and authors of the right craved to be reduced.

Eodem die.

Mistress of GRAY contra POURIE.

THE Mistress of Gray pursues Mr John Fotheringham of Pourie, as heir-male served and retoured to umquhile Thomas —, to pay a thousand pounds, with the ordinary annualrent thereof, conform to a bond granted by the said Thomas and his curators to this pursuer's mother, wherein, after compt and reckoning, it was found there was resting to her by the Laird of Pourie her son the sum acclaimed, for which, with consent of his curators, this bond was granted. *Alledged*, No process against the heir-male; because there is an heir of line served and retoured to the deceased Laird of Pourie, who behoved to be first called and discussed. Like-as, There is a reduction, depending, at the said heir's instance, of this same bond, *ex capite minoris ætatis et lesionis*, which is prejudicial to this action. *Replied*, There is no necessity to discuss the heirs of line, because the heir-male had transacted and obliged himself to warrant the heirs of line; so that the reason why heirs of line are to be first discussed ceasing, which is that they are obliged to relieve the heir-male of all burdens and debts belonging to their predecessor, the effect in law must cease also. As for the reduction, *nullo modo relevat*; because, tho' the heir of line should reduce it (as it is impossible,) yet this defender Mr John being then a curator, and a subscriber of the bond, and now fallen in to the estate by the decease of the granter, he can never quarrel the validity of the bond. The Commissioners found no necessity of discussing the heirs of line, but declared they would hear the rest of it *in præsentia*.

Eodem die.

MUIRE contra WAKINGSHAW.

JOHN MUIRE, as having a right from Gabriel Hamilton, who had right by assignation from John Wakingshaw, pursues Mr James Wakingshaw the father, to pay L. 100 sterling, given by Gabriel the cedent for releasing the said John Wakingshaw the son from slavery in the isle of Barbadoes, and L. 20 sterling lent him at his arrival here, upon a missive letter written by Wakingshaw the father, and sent to his son in Barbadoes, wherein he writes to his son, to agree with some merchant for his relief, and he would pay it out of the first end of his patrimony, which would fall to him by his mother's contract of marriage, which he declares in his letter to be four tenements of land, and 5000 merks in money; to which letter Gabriel takes an assignation, and pursues as said is. *Alledged*, *Abfolvitor* from the sums contained in the bonds granted in Scotland against the father; because no shadow of obligation on the father's part to pay these sums contracted in Scotland. *2do*, *Abfolvitor* from the sums advanced for his son's relief in Barbadoes,

badoes, because there is no personal obligation concluded against the father, nor any ground for an action against him in the said missive, but only a declarator, that his patrimony, if he any has, shall be liable therefor. To this the pursuer opposed his libel, and missive whereon it is grounded. And the Judges, after advising of the cause, decerned the father to pay the moneys contracted in Barbadoes, and assilzied from the sums contracted in Scotland, reserving action to the pursuer against the son therefor; and superseded the payment against the father till Whitsunday come a-year.

Vid. Haddington, 17th Dec. 1662. Libert, a Frenchman.

Act. Hog, & Dunmuir.

Alt. Dalrymple.

Eodem die.

IN a reduction intended by — of a bond granted for his releasement from Barbadoes *ex capite minoritatis*, &c. the defender was assilzied from the reduction, because the money was employed for so onerous a cause.

Eodem die.

Lady *LANGTON* contra Sir *JOHN ROLLO*.

BY contract of marriage betwixt Sir John Rollo and the Lady Langton's daughter, Sir John is bound (because of the sum of 10,000 merks given to him in tocher, by the Lady with her daughter) to employ 12,000 merks to her, and the heirs gotten of the marriage, which failing, to Sir John himself. Sir John, after her decease, marries another wife, and minding to give all to the second wife's bairns, the Lady Langton, and the bairns of the first marriage, pursues Sir John their father, as heirs and bairns of that marriage, to employ the sum contained in their mother's contract of marriage, upon security to them, to be made forthcoming either after his decease, or at the time of their marriage, &c. *Alledged*, The summons was not relevant, because disconform to the contract of marriage, bearing that sum to be provided to the heirs procreate of that marriage, and not to the bairns: Now, heirs *per verum naturam*, they could not be, so long as their father was living; so that heirs in the contract, must be understood, heirs served and retoured, and not bairns. *2do*, It were absurd that heirs served could pursue them to whom they succeed, because *pater et filius censentur una et eadem persona*, and a son may pursue himself, as well as pursue his father. Likeas, *confusione tollitur obligatio*, the heir of that marriage being the person bound to fulfil the contract of marriage, and so *debitum et creditum confunduntur*. Farther *alledged*, That in the reduction pursued at Sir John Seaton's instance, against his son, of an inhibition served by his son against him on his mother's contract of marriage, whereby Sir John was tied to provide the heirs of that marriage to L. 100,000, it was found by the Lords *in presentia*, that the heirs mentioned in the contract of marriage is always understood to be heirs served and retoured, and not bairns, and that there could be no execution at the son's instance against the father while he was on life; for the case was put thus: A father provides to himself in life-rent, and to his son in fee, 200,000 merks; were it not absurd to say the son should have action against the father for employment of this sum, the father being on life. Likeas, contracts of marriage look principally to the provision of wives, that, in consideration of their tocher, they may have a considerable donation *propter nuptias*; and in that respect, contracts are most favourable:

favourable; and when any thing is conceived in favours of the bairns, that is only to be expounded according to the strict words of the contract, and is not extended beyond the literal sense, as, in this case, the pursuer would insinuate, by interpreting bairns to be heirs; which is absurd. *Replied*, The summons is most conform to the contract, and if because by heirs in the contract are to be understood bairns *demonstrative*, not *qualificative* served and retoured; and that, in contracts of marriage, *non tam verba contractus, quod mens contrahentium inspicitur*, whereby it is presumed, that the parties-contractors intends the well and provision of their bairns, whether they be heirs served and retoured or not; otherways all contracts of marriage should be elusory; for the father, in his lifetime, may dispoise his estate, either to the bairns of the second marriage, or to strangers; and so the bairns of the first marriage, when they fall to be heirs, shall have nothing to which they can be served heirs, the father in his lifetime having defrauded them. The pursuer also alledged several practiques for him. *Answered* to this, *Incommodum non solvit argumentum*. The Judges found the summons relevant at the bairns their instance, and decerned the father to employ the sum acclaimed for their security, superseding execution against the father during his lifetime, and reserved his liferent.

A&A. Dalrymple. Alt. Gilmer.

N. B. This decision was in the Usurper's time; but it yet stands unreduced.

Eodem die.

WALLACE *contra* Earl of HARTFIELD, &c.

WALLACE of Faill, (this is Sir Thomas Wallace now) as having right from the committee of the shire of Ayr, by an act subscribed under their clerk's hand, pursues the Earl of Hartfield, and Laird of Kelhead, for restitution of 400 cows sent by that shire to maintain the King's army, then upon their march to England, and the King being gone before that supply came, the cows were intromitted with by thir defenders, without any warrant. *Alledged*, No process, unless the pursuer condescended on the names of the heritors to whom the cows belonged, and what was every heritor's proportion, and that he had right from these particular heritors to pursue this action. *Answered*, The pursuer had a warrant from the committee of the shire, and Mr James Dalrymple compeared for the haill heritors, and concurred in the pursuit. *Replied*, They had no power at that time in a committee of the shire to determine any such thing, being neither warranted by the Scottish authority nor the English. *Item*, That the shire of Ayr was not a corporation, as a college or a burgh, and so could not make a court, nor constitute a clerk, as the clerk of the shire, whose act can make no faith in judgment, as the public act of the shire. This business was agreed.

Eodem die.

ACTIONS for house-mails, servants-fees, &c. prescribe only *quoad modum probationis* by witnesses, but not *quoad* the verity of the debts themselves.

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Eodem die.

Eodem die.

S T E W A R T contra Laird of P H I L O R T H.

HENRIETTA STEWART, relict of a minister, pursuing the Laird of Philorth for payment of the bygones of her husband's stipend, belonging to her as his executrix nominate in his testament. *Alledged*, The testament is null, not being subscribed by the defunct, nor by a notary at his command. *Replied*, The testament is written by a minister, who subscribes as witness to the testator's disposition of his will. *Duplied*, That yet cannot make it have faith. *Triplied*, The minister knowing no better, and being ignorant of the solemnities of a testament, did subscribe witness, in place of declaring the testator's infirmity, and that he gave him warrant to subscribe for him. Likeas, by a posterior declaration since, the minister declared, under his hand, that he should have signed the testament as *de mandato testatoris*, having warrant from him to that effect, and that he had ignorantly subscribed witness, not knowing the custom. The minister's subscribed declaration was sustained to make the testament valid, and so they sustained the relict's title to pursue on.

A&t. Maxwell.

Alt. Gilmer.

Eodem die.

H A S T I E contra M A R I N E R S.

JOHAN HASTIE, indweller in Dundee, having delivered to one of the mariners of Captain Watson's passage-boat, betwixt Leith and Burntisland, a valise, within which there was L. 50 Sterling, and some other things, at his going on ship-board at Burntisland, and, at his arrival at Leith, craving his valise from the mariners, they deliver it to him with the strings out, and the L. 50 Sterling taken away; whereon he arrests the boat, by taking her wings from her, and conveens both the master of the boat, and the mariners, and Captain Watson the exercitor of the ship, to make payment and restitution to him of the L. 50 Sterling, stolen from him out of his valise, delivered to them at Burntisland, which was received by one or other of them, and so who are by the law bound to deliver the same, *l. 1. p. 1. D. nautæ caupones, &c. de recepto tales tenentur, ne alioqui cum sit necesse fidem eorum sequi, et res eorum custodiæ committere, occasio eis detur cum furibus quos recipiunt coeundi, nisi prædixerint ut quisque vectorum et hospitum res suas servant, aliter custodiæ nomine tenentur, etsi dolo et culpa careant.* This pursuit being moved before Englishmen, who were then present Judges of the Admiralty, they ordained the libel to be proven by witnesses, before they would discuss the relevancy thereof. The mariners declared on oath, That the valise had weight when they got it, and that it was lighter when they delivered it at Leith. The hirer declared, that when the valise arrived at Burntisland with the pursuer, it had the weight of 1000 merks, and that he was verily persuaded it was his money. The Gentlemen that came alongst with them in the boat, declared, that the valise, in the moving of it from the house to the boat, made a sound like money. The pursuer desired in this case, that his own oath might be taken in supplement, as is customary in Scotland, in such cases, as spulzie and theft, which was refused; and the whole process with the probation, being remitted to a jury, they assoilzied the defenders from the pursuit; which report of the jury was ratified by the Judges of the Admiralty, and so the pursuer lost the cause.

A&t. Gilmer.

Alt. Nortingham, Englishman, & Paip.

It seems the pursuer lost the cause upon the defect of probation; for by the tenor of the civil law, *Qui nautas quasi instrumenta navis adhibet curare debet*

debet ut omni culpa, et omni vitio careant, nam vitiosa instrumenta imputantur culpæ magistri navis et exercitoris, l. finalis p. 4. et 5. D. nautæ caupones, &c. That the Admiral would not ordain the pursuer to swear in supplement, as use is in cases of this kind, is very strange.

March 6. 1656.

M A S O N contra F L E M I N G.

MONSIEUR MASON, a factor in Rochell, having arrested a ship belonging to Thomas Fleming, whereof Thomas Bounting was merchant, and commisionate from Mr Fleming, the owner both of the bottom and goods, to unload the exported goods, to reload with salt, and to do all other things necessary for the voyage as if he were present himself. This Mr Fleming was debtor to Mason in two bonds, one of L. 3000, another of L. 2000. Bounting the factor and commissioner, finding this arrestment impeditive of his voyage, he makes an agreement with Mr Mason, wherein Mason discharges the arrestment, and hazards with Bounting L. 3600 upon policy of gross-adventure (this policy, &c. is, when not only the ship, but the goods are engaged, and the party has his hazard in both; whereas bottomry is allenarly when the ship is hypothecate) of that L. 5000 owing to him by Mr Fleming his constituent, and discharges him *pro tanto*: On the other hand, Mr Bounting, as commissioner, hypothecates the ship, and obliges him to make him sharer of the product of the gain of that voyage, to be had or got either upon the bottom, or the goods imported to Scotland. Whereupon Mr Mason calls Mr Fleming on this indenture of bottomry, to pay to him this L. 3600, at 24s. the livre, as he who is bound in law to stand to the paction made betwixt him and his commissioner Bounting. *Alledged* for Fleming, Bounting has transgressed the bounds of his commission, not having any power from him to hypothecate the said ship for his debt, nor yet by the maritime law could he contract debt upon bottomry, since, by that law, that is only competent to the skipper and master, and not to the factor, and not for every cause, but only in particular cases, as when a mast fails, or an anchor is lost, or a bowsprit split, or the like: In the which cases, tho' the skipper have no commission, yet he may contract upon bottomry, and by it the *exercitor navis* in law is bound; but, in the case of a factor or commissioner, who ought not to go beyond the bounds of his commission, it is *inauditum* to say, that he can bind the ship for payment of the constituent's debt, he not being commisionate thereto as a master of a ship. On the other hand, *alledged*, That the factor having an ample commission to do every thing as if Mr Fleming were present, and being *mandatarius*, he might very well remove all impediments of his voyage and advantage, as this arrestment made by Mr Mason was; and herein Mr Fleming cannot alledge he is wronged, since Bounting *tanquam optimus paterfamilias* had done for Fleming's advantage *et utiliter*, having insured L. 3600 to his constituent; for, if the ship had been taken, or cast away, Mr Mason would have lost so much money, and Mr Fleming would have gained as much. The Admiral, after dispute, assoilzied the defender, and found that Bounting could not upon bottomry bind Mr Fleming, being only a factor.

Act. Gilmer. Alt. Trotter.

March 10. 1656.

H O G contra J A C K.

HO G a skipper on the coast-side, being freighted by James Jack in Perth, for carrying sugar and tobacco to Perth, and being necessitate
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storm to run into St Andrews bay, whereby to preserve the goods, he lost both his anchor and cable, conveens this Jack to pay him L. 25 Sterling, as the loss sustained by him in this voyage; he thereby, to his own detriment, preserved the defender's goods, which, by the maritime law, he, as the merchant and owner of the goods, ought to make up; even as if *levandæ navis gratia*, any part of the goods had been cast into the sea, there behoved to have been a mutual contribution among the merchants of the goods to make up his loss whose goods were cast out. This plea is in sea terms called *average*. *Alledged*, Average is not due, but where there is charter-party; which was repelled, the voyage being but from port to port in Scotland. *2do, Alledged*, His goods were spoiled, and were not preserved from water. Thereon the Admiral issued out a commission to some skippers and merchants to take trial of the loss, and to report their judgment therein. This action for average has a clear warrant in the civil law, *Toto T. D. de L. Rhodia de jactu*, (as also the foresaid contract of bottomry is grounded therein) *præsertim l. 1.* for it is reasonable that every owner of goods in the ship share alike in the loss, since the lightning of the ship tends to their common utility, and that the goods that are cast is for saving the rest; therefore the owner of the cast goods has an action of the law against the master to retain the haill goods, until they make up the proportion of their loss; *sed si navis jactu levata, postea tempestate pereat, nihil contribuendum, nisi merces extrahantur*. And, in the estimation of the goods that are safe, the price ought to be not according to that they were bought at, but according to what they are presently worth, *l. 4. p. finali D. eod. tit. Item res jactæ sunt domini, quia non censentur pro derelicto, l. 2. p. finali D. eod. tit.* All these actions of bottomry, average, and the like, are called *prætorian*, because they flow not directly from the law, but from the authority of the Prætor, who had power *actiones dare ad instar, et similitudinem civilium actionum*. And this action of average is not directly warranted by the law of the Rhodes, but only *a paritate rationis*, the equity and ground thereof is drawn.

June 10. 1656.

Tutor of DUFFUS contra LESLIE.

THE tutor of Duffus pursuing Sir John Leslie, as heir to his father, who was tutor to the Earl of Rothes in a sale of lands, for registering the contract betwixt him and the Earl and his tutors. *Excepted* by Sir John, This contract cannot be registrate against him as heir to his father, who was tutor to the Earl; because the Earl had action of reduction, depending at his instance, against the tutor of Duffus, of this same contract, which is prejudicial of this action of registration. *Answered*, Tho' my Lord prevailed in his reduction *ex capite minoritatis*, &c. yet he behoved to have registration against Sir John, who is heir to him who was not minor. The Lords found the reduction prejudicial.

Aff. Nicolson.

Alt. Gilmer.

June 11. 1656.

Earl of ROXBURGH and his MINISTER.

THE Judges found themselves competent to rectify and reduce an enormous valuation and locality imposed upon heritors.

Aff. Gilmer. Alt. Elliot.

Eodem

Eodem die.

ONE Carmichael pursuing the Laird of Wedderburn, as heir by progress to —, to pay the sum of —, found that a tack of lands for a year, tho' otherwise probable by witnesses, cannot be sustained *ad hunc effectum*, to make one successor *titulo lucrativo*, &c.

A&T. Gilmer.

Alt. Norwell.

June 16. 1656.

R U T H E R F O R D *contra* Master of R O L L O.

JOHN RUTHERFORD for himself, and as assignee constitute by James Naesmith, pursues the Master of Rollo to pay L. 400, conform to a subscribed accompt betwixt him and the said James. *Excepted*, Compensation against James Naesmith; because he is resting a greater sum to Mr Laurence Rollo, conform to James Naesmith's bond; to the which bond Mr Laurence made his brother the Master assignee. The way of conveying this sum is somewhat long and tedious; and, therefore, the Judges, before answer in the cause, ordained Mr Laurence his oath to be taken *ex officio* upon the truth of the thing itself.

A&T. Nicolson.

Alt. Maxwell.

Eodem die.

C R A I G *contra* Lord T R A Q U A I R.

LEWIS CRAIG, as executor to Doctor Craig, pursues Lord Traquair to pay L. 4000, conform to a bond granted by Traquair and Queensberry thereanent, and left by way of testament to this pursuer as executor. Doctor Craig's heir of line compares, and desires to be admitted for his interest, and alledges, this sum cannot belong to the executor; because the bond being heritable, it cannot be disposed by testament, but must, *de jure*, pertain to the heir of line. *Answered*, Tho' the bond be heritable according to the law of Scotland, yet the testator being a denison of England, and the sum being lent in England, and the defunct dying in England, the way of succession to that sum must be regulate according to the law of England, which permits men to dispoise on lands and heritages in testaments, *cum nomina debitorum sequantur personam creditoris*. *Answered*, That he being born and bred in Scotland, the debtors being Scotsmen, the security being according to the law in Scotland, the way of succession to the same must be only according to the Scots law, and not the English; just as a Frenchman, dying in Scotland, and having heritage in France, his heir must have his estate according to the French law, and not the Scottish; and for this several practiques were alledged. This pursuer pursued also as heir of conquest; and it came to be debated, Whether this bond belonged to the heir of line or of conquest; and, after much contention, it was found to belong to the heir of conquest.

A&T. Nicolson.

Alt. Nisbet.

June 17. 1656.

A L E X A N D E R *contra* J O H N S T O N.

IN the foresaid action, Elisabeth Alexander *contra* Mr Samuel Johnston; *Alledged*, No process against Mr Samuel; because he, being but a cautioner in a suspension for Liberton, which was never discussed in the principal

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suspender's lifetime, is now ceased, the condition of the bond of caution being, that in case the principal should be found his debtor in his lifetime, that he as cautioner should make payment; which condition ceasing, by the death of the principal suspender, the bond of caution is null *quoad* the cautioner. It was debated, if a bond of caution in a suspension be such a conditional obligation as is not transmissible to the cautioner's heirs, the suspension never being discussed in the principal's lifetime. *Alledged* for the cautioner, That before the act of Sederunt in 1650, it was *indubitati juris*, that the cautioner was free, the principal not being discussed in his lifetime; but since that act, there is no doubt but the cautioner is bound. This was referred to be heard *in presentia*.

Act. Gilmer.

Alt. Fletcher.

Eodem die.

B O R T H W I C K S contra W A U C H O P S.

IN the foresaid declarator of redemption, Borthwicks *contra* Wauchop: *Alledged*, No declarator against Couberry-hill; because the order of redemption contained in the reversion, which is *stricti juris*, is not kept, wherein these lands are declared redeemable from Wauchop, on payment or consignation of 300 merks in so many *salutes*, (a specie of gold worth L. 18) in so many 18 s. pieces, and other strange coin, which cannot be got now; and so the pursuer, not observing the order prescribed by the reversion, cannot, on the said requisition, intent a declarator of redemption; and so the question came in to be discussed, whether it was *pecunia talliata* or *æstimata*? and whether, *in contractu mutui mutuarius tenetur, idem specie restituere mutuanti*, or no? This was long debated in the Inner-house; but the Judges, after all the dispute was ended, declared the lands to be lawfully redeemed, by the consignation of 300 merks in gold and silver, and found the bond of the reversion to be *obligatio generica*, not *specificica*.

Act. Nicolson.

Alt. Gilmer.

June 26. 1656.

B E T T I E contra ———.

ROBERT BETTIE, merchant in Edinburgh having conveyed — before the Admiral, in the King's time, before the Englishes came in, to pay L. 2000 which he had paid for the defender, and was contracted on bottomry; and having found John Johnston and Mr Meikle cautioners *judicio fisci et judicatum solvi*, he thereafter calls the principal debtor before the English Admiral to pay the said sum five years after the foresaid caution was found in the King's time, and the said Admiral (as their custom is) ordained the parties to submit the question betwixt them to merchants, who thereafter decerns the principal debtor to pay the said sum to — Bettie: Upon the which action and decreet-arbitral, Bettie, by way of action, conveys both the principal debtor and the said cautioners to pay to him the said sum contained in the decreet-arbitral. *Alledged* for the cautioners, *Absolvitor*, because they being cautioners to the Scots-Admiral, before whom the pursuer had tabled this pursuit once, and had deserted it without wakening the same of new again before the English Admiral; and so, not being *idem specie processus*, the cautioners must be free. *2do*, *Esto* it were *idem specie*, &c. yet the pursuer and the principal debtor having submitted the same, and a decreet-arbitral following thereon, and not having pursued the same before the Admiral, nor obtaining a sentence against the principal debtor,

debtor, they cannot be conveyen'd to pay the debt as cautioners *justicio sisti*, &c. *Answered*, It is *idem specie processus*, since it is *idem forum*, *idem actor*, *idem reus*, *et eadem materia*; and the submission was made by the Admiral, and was no voluntary act of the parties. *Duplied*, The Admiral could not, without the parties own consent, delegate a judge for any, being but a delegate judge himself. The Judges found the second member of the exception relevant, and assilzied the cautioners, in respect of the submission and decret following thereon.

Eodem die.

THE Lady Lochtour, being called as vitious intromissatrix with her husband's goods, desires the pursuers would condescend on what she intromitted with, and, noways granting the intromission, she craves the benefit of the act made by the Judges in 1653, whereby the certification of vitious intromission is declared to be only the double of what is proven. And so it came to be debated, Whether the said act, made for regulating of commissaries, and other inferior courts, in cases of this kind, did extend to pursuits tabled before the Lords, who are the supreme court, and if an act of this kind might be made in prejudice of a consuetudinary law, which, in force, is equivalent to an act, and if it can look backward to intromission before the act, *viz.* to such who before the act were decerned vitious intromitters, or only to such as are pursued *eo nomine* after the act?

Eodem die.

A Spuilzie of teinds is pursued by ——— against the Lady Ballevin. *Alledged*, *Absolvitor*, because she intromitted, by virtue of a tack flowing from Sir James Stewart, who had right by assignation from ——— the titular. *Answered*, *Non relevat*; because, long before your assignation, the pursuer had, before the Commissioners for valuation, obtained decret against the cedent for the valued bolls; and so ye had no reason to meddle *cum ipsis corporibus*. This was found relevant, and decerned. Then it was offered to be proven, That, at the pursuer's direction, she meddled with the teinds; which was found relevant to be proven, *scripto vel juramento partis*, and no otherways.

June 24. 1656.

Lady *ANGUS* contra the *EARL*.

THE Lady Angus pursuing the Earl of Angus's son, her stepson, for implement of her contract, as heir, or lawfully charged to enter heir to his father. *Alledged*, There is a reduction of this contract intended by him, as heir of provision, which is prejudicial to this. This was repelled. Then *alledged*, He was content to renounce to be heir *ad hunc effectum*, that the Lady might bruik all the estate belonging to his father, except what was provided to him by contract of marriage betwixt the Earl his father and his first Lady. *Answered*, He behoved to renounce to be heir, without any qualification at all, being *actus purus, qui nec admittit diem nec conditionem*. This was desired to be heard in the Inner-house.

AQ. Nicolson.

Alt. Gilmer.

Eodem

*Eodem die.**S M I T H contra* —————

SIR John Smith, having obtained decret against the heritors and life-renters of the shire of Dumfries, to pay him two months maintenance, he is suspended, and a reason is produced of his decret, on this reason, That it is null, being given without any probation, or condescending particularly on the names and surnames of the defenders, and without specifying the particular quantities owing. This decret was sustained, the pursuer being special on the heritor's valuation.

*June 28. 1656.**C A R M I C H A E L contra M U I R, &c.*

GIDEON MURRAY having taken a ship with ammunition from the English the time of the late troubles, and having disposed thereon, and got Sir Daniel Carmichael's bond for the commodities; he, after the English had subdued this nation, assigns the bond to this charger James Muir; and Sir Daniel suspending on double poinding, as being troubled by the Commissioners for the commonwealth on the one hand, and the said James on the other, it came to be disputed, whether the commonwealth ought not to have their own back again, and be preferred to any other party whatsoever. The Commissioners preferred the assignee, reserving the commonwealth's interest against the cedent.

Eodem die.

MR Robert Rule, as having warrant from the Commissioners for the plantation of kirks, and visitation of colleges, conveens the council and community of the burgh of Stirling, to pay 1400 merks, as the modified stipend, due by them to the second minister of Stirling. It is to be observed, that this pursuer was neither called by the people nor the presbytery, and therefore shunned to pursue as minister, but as having warrant from the Commissioners, as said is, lest his call should come in question. *Alledged,* The Commissioners orders and warrants of this kind was to be understood, where there had been a stipendiary minister, or a person who was titular to the teinds, by whose decease the benefit being vacant, the Commissioners had power to authorise any they pleased; but, there being no modified stipend here, due by the town of Stirling, nor any teinds in the parish for making up a maintenance to a second minister, it is against reason to compel Stirling to pay a stipend to a second minister; especially considering that any stipend they paid to former ministers, that was by the benevolence of the crafts, who cannot be forced to pay a stipend to any minister but such as they are pleased with.

*July 1. 1656.**W E I R contra D E N N I S T O N.*

THERE was a bond granted by Mr David Denniston to Bessie Weir, obliging himself and his heirs to set her a tack of a tenement of land during her haill lifetime, for payment of 20 shillings; but does not set it *per verba de presenti*, but only that he shall set it. Thereafter Mr David infest his

his wife in liferent in that tenement, who, after her husband's death, pursues a removing against this Bessie; who suspends, That she having a real right to that tenement, by her tack, long before the pursuer, and was in possession. *Answered*, Any right she had was but a personal obligation against Mr David and his heirs to fulfill that tack, and could not prejudice her liferent, she standing infest on Mr David's resignation, the tack being only *per verba de futuro, ut supra*. The Judges found not this tack a right such as to maintain her in her possession, against a singular, being but a personal obligation, for which she had a personal action competent to her against the heirs of the granter.

A^t. Nicolson.

Alt. Gilmer.

Eodem die.

— contra —

IN the Inner-house, it was found, in a pursuit of a pupil against his curators, that all the curators who have sworn and accepted, and have in some part intromitted with the pupil's interest, are not liable *in solidum* therefor, but only according to their intromission, contrary to the civil law, and the former decisions of the Lords of Session.

A^t. Dalrymple.

Alt. Gilmer.

July 2. 1656.

MUIR contra WALLACE.

IN a pursuit, betwixt Mr Hugh Muir and Wallace, it was found, that a provision made by the father to his daughter, in contemplation of marriage, is not a forisfiliation of the said child, unless she declare the acceptation of that provision to be in full contentation of all bairns part of geir, portion-natural, &c. and if the provision do not seclude her from being a bairn of the house, she has a *legittima* with the rest of the bairns unmarried, but so that she must confer *bona præcepta tam mobilia quam immobilia* with the rest, or else the rest unprovided must have as much as the other got before they divide; the reason whereof is, because, whatever the father provides his daughter to, in his lifetime, *præsumitur donare sine deductione legitime*; and this is agreeable to the civil law.

A^t. Nisbet.

Alt. Wedderburn.

July 3. 1656.

MAXWELL contra MAXWELL.

ALLEXANDER MAXWELL grants a bond, to Grissel Maxwell his daughter, and the bairns gotten of her body, for 2000 merks. Grizel's husband being a prodigal young man, grants a discharge of this sum: After his decease, Grizel and her bairns crave the said sum of her father's heir; who *alleges*, That he as heir could not be decerned to pay that sum, but must be assoilzed; because Grizel's husband, as *dominus bonorum uxoris*, had discharged it. *Answered*, He had but a naked liferent of that sum, and so his discharge could not liberate the defender, the bairns only being fiars. *Replied*, By the conception of the bond, bearing it to be payable to Grizel, and the bairns of her body, the mother was fiar of the sum, and not the bairns only; and so the husband, *jure mariti*, might discharge it. The Judges found the bairns fiars of the sum, and not the mother, so would not admit the discharge:

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charge:

charge: This was the rather found, because she was a poor miserable woman, and her husband was a prodigal.

Act. Oliphant.

Alt. Heriot.

July 4. 1656.

S P I T T L E contra H A Y S.

MR Theodore Hay, as principal, and Mr Alexander Spittle, as cautioner, grants bond to Sarah Spittle for 3000 merks, which bond was heritable, and assigned by her, *in lecto agnitionis*, to her mother, who charges Mr Theodore to pay it to her as assignee, and, without recovering payment, dies. Thereafter James Spittle serves himself heir to this Sarah, and conveens the relict and executors of Mr Theodore to pay this debt, who paid him the sum, after sentence recovered against them, and reports his discharge. Long after, one Home serves herself heir to Sarah's mother, who was assignee to that sum, and as heir to her conveens Alexander Spittle the cautioner; who alledges, *Absolvitor*, because the relict and executors of the principal has paid it to Sarah's heir, by virtue of a sentence against them. *Answered*, The principal debtor's executors had *indebito* paid that sum to Sarah's heir; because she was denuded of the right thereof in favours of her mother, before her decease; and the mother had intimate the assignation in the cedent's lifetime to the principal, by causing charge him with horning to pay it; and so any alledged payment made to Sarah's heir, after they knew she was denuded, can never liberate the cautioner. *Answered*, The intimation was but personal, and died with the person to whom it was intimate, and did not put the relict *in mala fide* to pay the debt. *Item*, The defender takes instruments on the alledgeance, bearing the assignee to have intimate her assignation by horning, by doing whereof the bond became moveable; and so belongs to the assignee's executor, and not his heir. *Answered*, It is *jus tertii* to the defender, and they will warrant him, by finding caution. The Judges found the cautioner liable in payment of this debt to the assignee, reserving him action against the heir for repetition.

Act. Sinclair.

Alt. Gilmer.

Eodem die.

F O R B E S contra C R A I G I E W A R.

FORBES, having recovered a sentence against the heir of Craigiewar for payment of 2000 merks, it is suspended, because the bond is conditional, either to pay him 2000 merks, or to give him a right to the teinds of Bannagask, and the decret concluding absolute payment of the sum without this condition, is null. *Answered*, The bond is an absolute bond, wherein Craigiewar is bound to pay 2000 merks *pure*, and was not contracted *sub ulla conditione*; for, there is a difference in law betwixt a bond *que contrahitur sub conditione*, and a bond *quæ sub conditione resolvitur*; and unless ye say the condition was performed, which resolved the bond, the bond must be repute a pure absolute bond; but so it is, the condition was not performed betwixt and the term prefixed thereto; and so there is *jus quesitum* pure to the pursuer. The bond was opposed as conditional, and for the not performing of it, the defender is willing yet to do it, and *nihil tibi deest*.

Eodem

Eodem die.

M'INTOSH *contra* MONRO.

M'INTOSH, pursuing Monro as heir, at least as behaving as heir by intromission, &c. to Monro of Foullis, to pay 2000 merks owing by the Laird of Foullis. *Alledged*, No process against him, because he being but the apparent heir of tailzie, he cannot be conveyed for any debt, neither as heir nor intromitter, till the heir of line be first discussed. *Answered*, There is no necessity to do that here, nor can he be heard to alledge it; seeing he has married the heir of line, and so behaved to compare and answer for his wife, they being *una et eadem persona*. The Judges assoilzied the heir of tailzie, though he had married the heir of line, and ordained her to be first discussed.

Eodem die.

Lady LANTON *contra* the LAIRD.

THE Lady Lanton pursuing the Laird and his tenants for abstracted multures, she being liferentrix of the mill *cum multuris*. *Answered*, No abstracted multures, because there was no mill the years for which these multures are craved. The defender was desired to condescend *quo modo* there was no mill; whether by want of water, or for want of wheels, and other materials, and to tell *quando*? For if he would condescend it was for want of water, it was offered to be proven it was the Laird's fault, he having used violence against these who came in the Lady's name to help the current of the water to the mill.

July 4. 1656.

BURNET *contra* KILRAIK.

MR WILLIAM BURNET, as donator to the ward and marriage of the Laird of Kilraik, pursuing him to pay L. 100 yearly as the tax-ward of his lands during the ward, and a L. 1000 for the avail of the marriage, which was so taxed. *Alledged*, No process for the marriage; because the Protector's act had discharged casualties falling to superiors by ward or marriage of vassals being minors. *Answered*, The said act concerns only casualties since the date thereof, and not these that fell before the act. *Replied*, The donator to the marriage cannot crave the benefit thereof, because the minor is not marriageable, being but an infant of nine or ten years old; and he cannot pursue, until the vassal be marriageable, though the said act wholly discharges the same. *Answered*, It imports not, whether the minor be marriageable or no, but if at the time of the ward he be minor unmarried, the casualty of the marriage falls to the superior his donator; for, *potentia*, not *actus* is respected. This cause was ordained to be heard in the Inner-house.

Act. Fletcher.

Alt. Nicolson.

Eodem die.

The Earl of KINGHORN *contra* ———.

THE Earl of Kinghorn, as infeft in the teinds of the parish of, &c. pursues a spuilzie thereof against the tenants possessors thereof, &c. *Alledged*,

Alledged, No spuilzie, because my Lord had no right to the teinds, his seisin bearing him only to be patron of the said kirk, and to be infeft *cum decimis garbalibus ei spectantibus*, which he had relation to another kirk immediately before, but not to this. *Answered*, That though he were not infeft *cum decimis*, yet, being patron, he has right to the teinds libelled, by act of parliament made in 1649, providing, that the patrons of kirks shall have right to the teinds of these kirks, and shall belong to them heritably. This was so found.

A&T. Trotter.

Alt. Gilmor.

July 20. 1656.

ALEXANDER contra JOHNSTON.

IN the foresaid action of Alexander and her spouse, against Mr Samuel Johnston, as cautioner in a suspension for the deceased Laird of Liberton, the Judges found, after much dispute in the Inner-house, that a suspension not discussed in the suspender's lifetime, the cautioner in the suspension is free, because, by the conception of the bond of caution in a suspension, it was found, that the cautioner was bound only conditionally, *viz.* That, in case, after the discussing of the suspension, it be found, the principal suspender should pay the sums charged for, that he, as cautioner for him, should pay it, or cause him pay it, conform to the Judges decret to be given thereanent; which not being done in this suspender's lifetime, the cautioner is free; a conditional obligation being merely personal, and the rather because the caution was found long before the Lords act of Sederunt in 1650, declaring cautioners to be liable to the debt charged for, albeit the suspension be not discussed in the suspender's lifetime.

A&T. Wedderburn.

Alt. Nicolson.

July 18. 1656.

— contra K E R.

ANDREW KER on deathbed nominates John Ker, his bastard-son, his executor and legatar, before the minister of the parish, and some other gentlemen, and, after he was dead, the minister, by way of instrument, extends a testament, conform to the declared mind of the defunct in *tertia persona*; wherein this John is executor and subscribes the same, declaring that to be the mind of the dead. This testament, being craved to be reduced, because it was null, in so far as it being only a nuncupative testament, declaring by way of instrument in *tertia persona*, that such a day, such a man named such a man to be his executor; whereas a valid testament ought to be in *prima persona*, and ought to be read to the testator, and either subscribed by himself, or a notary, or minister *de mandato testatoris*; none of which is here done: *Item*, It is compiled after his decease. *Answered*, The pursuer had homologate the testament, and these solemnities of being read to the testator, subscribed by him or a notary, bearing *de mandato*, &c. are not necessary in our law, and that it was ordinary in Scotland to extend testaments after the testator's decease, and to subscribe for them; yet the Judges reduced the testament, and found it null.

A&T. Nicolson.

Alt. Gilmor.

Eodem

Eodem die.

— contra Laird of PLUSCARDY.

THERE was a bond given by the Lady Grange to her bairns gotten of her first husband, wherein she ties herself to pay them yearly 600 merks. This bond being delivered to the Lady Lanton her mother the time of her contract with the Laird of Pluscardy, and the tutor of Grange's bairns craving a sight of it from the Lady Lanton, to whom it was intrusted, not to be given up either to the bairns tutors, or themselves, without their mother's consent. It was put in the register, and the extract returned to the Lady Lanton; whereon the children, after their pupillarity, and *in consilio majoritatis*, charges Pluscardy, for his interest, to pay this 600 merks yearly since the date of the bond; who suspends, and intents reduction of the bond, on this reason, That it was null, being given by a woman *post contracta sponsalia*, and a promise of marriage proclaimed betwixt Pluscardy and her, whereby the lieges were put *in mala fide* to contract with her, who could not tie herself after contract and proclamation with him, without his consent. *Answered*, *Non relevant*, unless he would say, That their names were inrolled and registrate in Mr Patrick Henderson's books, and proclaimed thrice before the subscribing of this bond; for the chargers offered to prove, that after her subscribing this bond, their names were given up to Mr Patrick, and, conform thereto, were proclaimed and married; and that their contract was also subscribed after this bond, and so she was *sui juris* the time thereof. *Answered*, It was enough to say there was a promise of marriage proclaimed; and whether there was a contract or no, *non refert*; for contracts may be without marriage, and marriage without contracts; and this they offered to prove by witnesses. The Judges found not that manner of probation relevant, unless the suspender would say, inrolled in the common register, and proclaimed through the haill kirk thrice, and found the chargers alledgeance more pregnant; then they referred it to the chargers oath, That their mother was promised in marriage, and proclaimed before this bond. *Answered*, Her husband will not permit her to swear to his prejudice. Then they referred it to the tutor's oath; but all this was repelled.

Eodem die.

IN a spuilzie of teinds, if the defender offer to prove lawfully poulded, he must condescend upon what ground, at whose instance, for what sum contained in such a bond, or such a decret, that the pursuer may take him away by a reply.

Ad. Nicolson.

Alt. Maxwell.

July 20. 1656.

PITFODDELLS contra DONALDSON's Creditors.

JOHN DONALDSON in Aberdeen, having lent the Laird of Pitfoddells 20,000 merks, and having got a wadset of his lands therefor, under reversion of the said sum, payable by Pitfoddells to the said John his heirs and assignees, and suspending the requisition for seven years to come after the date of the contract. This John, being a bankrupt, he assigns to many of his creditors this 20,000 merks, to some of them 4000 merks, to another 5000 merks resting by Pitfoddells: which assignations being intimate by the

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creditors

creditors to Pitfoddells, he gives bond to the assignies, and takes a discharge from them of the monies resting by him to Donaldson, and accordingly pays them annualrents therefor. This discharge contained also a discharge of the wadset of Pitfoddells lands, but was not a formal renunciation nor grant of redemption; neither was it registrate conform to the act of Parliament: Thereafter the Laird of Waterton, for the sum of 10,000 merks owing to him by John Donaldson, comprises the right of the wadset, and thereon is infest, and requires Pitfoddells to pay the sum, and the maills and duties of the lands; who finding himself so distressed, raises a summons of multiple-poining, wherein he calls both the creditors, assignies and comprisers, to hear and see it found and declared, that he is only tied in once and single payment of the said sums, and that to any of the said parties who shall be found to have best right. The compriser contended he ought to be preferred; because an assignation and intimation thereof is not *habilis modus transferendi dominium*, and the right, standing in Donaldson's person, to that wadset, is not transmissible by assignation; because it is *jus in re*, and that *immobili*, and cannot be conveyed from Donaldson but by a real right. Likeas, There is no reality in *fundo sine fasina*. Alledged by the assignies, The right of wadset was extinct by Pitfoddells his giving bond, and accepting a discharge from the assignies to the wadset, and sum owing to Donaldson. Answered, Nothing can extinguish a wadset, but a renunciation or grant of redemption, registrate conform to the act of parliament. The Judges preferred the compriser, and ordained the assignies to repay the annualrents received from Pitfoddells to the Laird of Waterton compriser.

A& Nicolson, & Gilmer.

Alt. Nisbet.

November 20. 1656.

R A E contra

A Spuilzie of a valise pursued by William Rae against a Vintner in Dumbarton. Alledged, No spuilzie, because offered to be proven the same was restored to the pursuer haill, locked and sealed; which the Judges found relevant.

A& Gilmer.

Alt. Dalrymple.

Eodem die.

THERE is a reduction pursued by William Braid, and his spouse, against Mr John Dunlops *ex capite minoris etatis*, &c. The Judges found it necessary to libel lesion, and that minority was not relevant *per se*. Alledged, The assignation craved to be reduced was given by the pursuer to the defender, without any cause onerous, and so was to his enorm prejudice, unless he would condescend on some onerous cause why the same was given. Then the defender alledged, the cause of the granting the said assignation was for collecting a number of papers and writs belonging to the pursuer, which were scattered through the country; and for collecting whereof, he had depursed sums equivalent to the sums assigned; which was found relevant, he condescending on the persons to whom they were given.

A& Maxwell.

Alt. Nicolson.

Eodem die.

IT was found, that, though, by an act of Sederunt, suspenders are ordained to give a full copy of the suspension to the chargers, before the day of

of compearance; yet, if a short copy be given, and, notwithstanding thereof, the charger point, he cannot be conveyen as a spuilzier. But the Judges ordained the party to find caution to make these same goods forthcoming, in case the letters be suspended.

A^{ct}. Maxwell.

Alt. Sinclair.

November 23. 1656.

M U I R E *contra* M A X W E L L.

A Decreet-arbitral being craved to be reduced by James Muire taylor in the Potterrow, against Alexander Maxwell of Dechmond, *ex hoc capite*, That the decret was null, because pronounced after the day contained in the submission, and was antedated, as done before, and this was offered to be proven by the arbiters oaths. This the Judges repelled, and found it not relevant to prove the nullity of a decret-arbitral, pronounced and delivered to the party, probable by the arbiters oath; because it was the defenders evident, and could not be taken away by the judges oath.

A^{ct}. Dalrymple.

Alt. Wedderburn.

November 25. 1656.

T Y R I E *contra* M' M A T H, and others.

I N the double pointing, raised by Sir Thomas Tyrie, against Widow M'Math, and Sir Laurence Oliphant of Bask, the one arrester, the other assignee. Arrester *alleges*, Her arrestment is prior to the assignation; because the one is in 1646, and the other in 1647. The assignee contended, his right to be dated in 1638; and so to be prior her arrestment. *Answered*, That assignation in 1638, is null and false, in so far as it bears date March 1638, and yet bears an assignation to a decret recovered against the suspender as heir to his father in June 1638; and so is false and feigned, bearing a decret to be assigned, which was not then *in rerum natura*. *Replied*, The same was not material, being but a mistake of the writer, taking March 1638 for November 1638; and he was content the month should be delete, and hold his assignation to be in the year 1638, without mentioning March; and the month is not substantial, if the year were expressed: Likeas, There was horning and caption raised on that assignation in 1638, to evidence the truth and reality of the matter; and if the arrester will say, the subscription is false, it were relevant; but to call it false for the miscounting of two or three months, it is ridiculous. *Answered*, The same is false in the date, by ocular inspection; and being *falsum in data*, it is *falsum in omnibus*; and that it was sufficient to say, it was false in the day of the month, otherwise the arrester should be prejudged of her exception of *alias* and *alibi*. The Judges preferred the assignee to the arrester.

A^{ct}. Nicolson, Gilmor, Nisbet, & Dalrymple.

November 26. 1656.

G L A S S *contra* Laird of S T E V E N S O N.

A L E X A N D E R GLASS and his wife pursuing the Laird of Stevenson, as heir to his father, to pay 400 merks, conform to a bond granted to her thereon. *Alledged*, The heir cannot be conveyen to pay this sum, because

because the bond was never delivered to the pursuer in the debtor's time, but was beside himself the time of his decease, undelivered; and so, not being the pursuer's evident, the defender cannot be conveyed; and this was offered to be proven by the pursuer's wife's oath, which the Commissioners would not sustain, in prejudice of her spouse.

Act. Fletcher.

Alt. Gilmor.

November 30. 1656.

ALURED contra BOISSIE.

MR ALURED, an Englishman, pursuing a reduction of a decret-arbitral against Squire Boissie, as being *ultra vires compromissi et ex capite iniquitatis*: After much debate, they found it not *ultra vires*, the submission being general; and tho' it were unjust, yet it could not be reduced *ex hoc capite, quia standum est sententiæ arbitri, sive æquæ sive iniquæ.*

Act. Nisbet.

Alt. Nicolson.

Eodem die.

THE Commissioners find themselves Judges to establish a locality to a minister, where there is a decret recovered before the commissioners for plantation of kirks, tho' the same be not locally settled.

December 1. 1656.

— contra —

THE Lords found, that no deed of contravention done by tutors, could be libelled against a minor having curators, because contravention is a penal action, and a pain cannot be inflicted on any *nisi ex delicto.*

Act. Maxwell.

Alt. Nisbet.

December 8. 1656.

ALL summonses that are *in facto*, ought to contain two diets of compare-ance, to which the defender ought to be summoned by a messenger of arms, unless the summons be verified by writ instantly, and that the pursuer renounce all other probation but what shall be by writ.

December 10. 1656.

Laird of NEWARK contra KINLOCH.

THE Laird of Newark, elder, having entered in payment of 5000 merks, advanced by Francis Kinloch to the young Laird his son, and having in his missive promised to pay the rest, is conveyed thereon, by Francis, to pay the remainder, conform to his missive; which the Judges discerned him to do.

Act. Spence.

Alt. Maxwell.

Eodem die.

ELEIS contra SMITH.

MR JAMES ELEIS, as executor to his father, (who was assignee, made by one James Eleis a factor, to the sum of L. 4000 resting by Sir John Smith to the said James Eleis factor) pursues Sir John Smith to pay the said sum, conform to a fitted accompt subscribed by both parties. *Alledged,*

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The said fitted accompt bears an order to Sir John to pay that sum to John Clerk for the like sum resting by James Eleis to him. *Answered, Non relevat*, unless Sir John say he has paid it to John Clerk before the assignation made by James Eleis, and the intimation made to Sir John; because he was *in mala fide* to pay that sum to Clerk after intimation. *Replied*, Before intimation Sir John had promised to pay that sum to John Clerk. *Alledged*, *Non relevat*, tho' he had promised, because any order that was on the back of the accompt, was but a mandate by James Eleis the cedent, to Sir John to pay, which mandate is revocable by the mandant, at any time before payment made by the mandator. Likeas, this mandat is actually revoked by James in granting this assignation now pursued on long before payment made to John Clerk; and Sir John should not have paid John Clerk, but suspended on multiple-poining. The Lords found the promise made by Sir John, before the arrestment, relevant; and the dispute was *de modo probandi*. Thereafter they found it probable by Sir John's oath, and affoizied him, in respect of the compt above written, which was a fitted balanced accompt of debtor and creditor, and was *equè* betwixt them both, containing the order of payment foresaid, and found a compt so fitted, *lege mercatoria*, equivalent to a discharge.

Aff. Dalrymple.

Alt. Gilmor.

Eodem die.

CRAILL contra PITTENWEEN.

THE town of Craill pursuing the town of Pittenweem to pay a yearly duty of L. 4 Scots, resting since 1640, for the privilege and liberty granted to them to traffic within their port. *Alledged, Absolvitor*, because that sum was *datum ob causam, causa non secuta, viz.* for the privilege of the waters which was taken from them, by a deed flowing from the pursuers, and which they specially condescended on. The Judges inclined to give sentence against Pittenweem, reserving action to them as accords of the law against Craill. For the case was put, as of a superior pursuing for his feuduty, who cannot be hindered by any alledged intromission of his with the maills, &c. for that is reserved to the vassal as accords.

Aff. Gilmor.

Alt. Wedderburn.

December 16. 1656.

MOSLEY contra HARPER.

MOSLEY, Englishman, as factor from one Biche, pursues Harper to pay the sum of —, owing by his wife, and contracted by her *ante matrimonium*. *Alledged* by the husband, He cannot be conveyened now for his wife's debt *post dissolutum matrimonium*; because, if his wife were alive, he could only be conveyened *pro interesse et jure mariti*; which interest ceases *post mortem mariti*, if the right of the debt was not constitute *stante matrimonio* against the husband. *Answered*, The same was constitute against him *stante matrimonio*, in so far as he being cited for payment of this debt in England: The custom is there, that, if the defender be *contumax*, he is declared rebel and outlaw; whereas, here he is holden as confess, if he be absent; and so the pursuer having got an outlawry against the defender in England, which is equivalent, as if he had been holden as confess, he cannot be heard to alledge now that the debt was not constitute against him *stante matrimonio*. *Answered*, Tho' it be the custom of England to declare

a man outlaw, that is, *contumax*, yet that outlawry does not establish the debt in the outlaw's person. This was desired to be heard *in presentia*.

December 20. 1656.

L E V I N S T O N *contra* M I T C H E L L.

L E V I N S T O N pursuing Mitchell to pay 500 merks, contained in a minute relative to a contract: *Alledged*, No process, because the minutes are null by act of parliament, wanting writer's name; and, *2do*, It is most suspect of falsehood, because the sum was written in figures, and the date and year of God in figures; yet the Judges sustained process upon the minute, and decerned.

Eodem die.

J O H N Y O U N G, having arrested in the hands of Montgomery of Cockleby 500 merks resting by him to Montgomery of Langshaw, and having conveyed Cockleby to make it forthcoming, and, referring the debt to his oath, he depones he was owing to Langshaw 500 merks by bond, which bond was delivered by him to Langshaw, blank in the creditor's name; whereon the sheriff, before whom it was pursued, decerns Cockleby to make payment. This decret being suspended, upon a reason of iniquity committed by the sheriff, in decerning him to pay contrary to his oath; for, having declared that he knew not to whom he was debtor, and that he had given a blank bond to Langshaw, but whose name he had filled up in it he knew not; and that it were impossible for him to shun double payment, if he were decerned to pay to the charger. *Answered*, He having confessed he had given a bond to the charger's debtor, tho' blank in the name of the creditor, he was thereby bound to pay to him the sum therein contained. The Judges, after hearing of both parties, decerned against the suspender, and found the letters orderly proceeded.

Aff. Maxwell.

Alt. Dalrymple.

The contrary to this was found, in 1649, betwixt Douglass of Chester and the Duke of Hamilton and Lord Belhaven.

December 25. 1656.

R O S N A L D *contra* ———.

A N T H O N Y R O S N A L D pursuing some merchants in Leith for the price of 400 bolls of victual sold by him to them, or to ——— having their order. *Alledged*, *Abolvitor* from this process, because they being conveyed before *super hoc medio*, they were affoizied. *Replied*, The *medium* was not the same, but distinct, in so far as the first *medium* was that their factors and attorneys, in their name, had received the said victual; and now they were conveyed *super hoc*, that they received it themselves. The Commissioners found this *medium* different from that in the first *abolvitor*.

Aff. Dalrymple.

Alt. Norvell.

Eodem die.

P I T C A I R N *contra* ———.

W I L L I A M P I T C A I R N, merchant in Dundee, having arrested the sum of 3000 merks, less or more, addebted by my Lord Deskford and Balthaik

Balthaik to one Wingate, and having obtained decret, for making arrested sums forthcoming against them, before the sheriff of Perth; and they there-after dying, he conveens their representatives before the Commissioners to pay that sum, contained in the decret recovered against their father. *Alledged*, They cannot be conveened, because any debt they were owing to Mr Wingate, was as cautioner for the Earl of Kinnoul, and their father's being conveened *nomine fidejussorio*, and being holden as confessed, their confession cannot work their relief against the principal; for the case was put, as if a bond were subscribed by cautioners, the principal not subscribing, whether or not the cautioners are liable, or may be charged on that bond, is a question; just so a cautioner's confession, without the principal, can work no more; which the Commissioners repelled.

Añ. Heriot.

Alt. Syme.

Eodem die.

G I B S O N *contra* B U R N E T.

GIBSON pursues Burnet for payment of maills, &c. of the lands of — belonging to the pursuer by a comprising. *Alledged*, No maills and duties at the pursuer's instance against the defender, because he had taken a tack from him of thir same lands where out of he craves the maills and duties; and so, by being his tacksmán, he had ratified his right, *hoc maxime attento*, that the accepting of the tack was after any real right he now pretended to the lands. *Replied*, The defence is no ways relevant for years after the expiring of the tack, unless the defender will say he has a real right to the lands anterior to the pursuer's right; and the accepting of a tack from the defender cannot hinder the pursuer to call for the maills, &c. of the lands wherein he stands infest, unless the defender will reply upon a better right standing in his person. The Judges ordained the defender to condescend on a better right standing in person.

Añ. Maxwell.

Alt. Dalrymple.

Eodem die.

— *contra* —

A Pupil being conveened, as heir to his father, for payment of a sum, and offering to renounce, and, *in termino*, producing a renunciation subscribed by himself, it came to be debated, whether this was a relevant renunciation or not, not being subscribed by his tutors. The Commissioners, after *avisandum*, sustained the renunciation, though not subscribed by his tutors. *Ratio*, Because, though tutors did subscribe, yet the minor might revoke it, if it was to his prejudice, and the authorisation of tutors cannot hinder a minor to reduce it *debito tempore*.

Eodem die.

T H E Lords found a Baron being once infest, though thereafter disseised, and a Lord of Parliament, though not infest in land, that both these may have moveable heirship.

January

January 1. 1657.

DUNMUIR contra Bailies of CULROSS.

JOHAN DUNMUIR pursuing the Bailies of Culross, *actione subsidaria*, for not apprehending the Earl of Kincardine, and putting him in prison when they were charged. *Alledged*, *Afolvitor*, because it is offered to be proven, that he, being sick and distracted, and a Nobleman, they confined him to his own chamber, and were content to oblige themselves to make his person forthcoming to the pursuer, when he convalesced: Which was found relevant to absolve the Bailies, contrary to the daily practice, though it seemed equitable.

Act. Dunmuir.

Alt. Wedderburn.

Eodem die.

IN a contravention, they found that order and direction given by any party to cast seal and divot, was not probable by witnesses, but only *scripto vel juramento*.

Act. Maxwell.

Alt. Wedderburn.

January 4. 1657.

BEATSON contra BURNET.

BEATSON, an Englishman, pursues Thomas Burnet for maills and duties of lands wherein he stood infest. *Alledged*, The pursuer has taken a tack of him, and has become his tenant in thir lands after his right, whereon now he craves maills and duties; and so, by becoming the defender's tenant, he had homologate his right to be better than his. *Replied*, He craves no maills for the years of the tack, but allenarly since expiring thereof, &c. as in the preceeding page, between Gibson and Burnet.

Eodem die.

ROCHEAD contra the Laird of AYTON.

IN a pursuit by Mr James Rothead, against the Laird of Ayton, for payment of a back-tack-duty, and for annualrent of the said back-tack-duty, in case Ayton failed to pay the duty at the term, conform to a contract of wadset past betwixt Ayton and him. The Lords would grant no process for the annualrent of the back-tack-duty, itself being but annualrent, and so ought not in law to bear annualrent, notwithstanding of the contract.

Act. Wedderburn.

Alt. Hog.

Eodem die.

GELL contra CLARK.

PATRICK GELL, in a suspension having found his own son cautioner to John Clark, and the cautioner being charged, suspends on this reason, That he was minor at the time of his becoming caution, and lesed, and so was reducible in law. The Lords assoilzied from this reduction; because it was found, that the son offered himself cautioner, and so was *in pessimo dolo* to become caution, knowing his minority and lesion, *et malitia supplet ætatem*,
and

and that he had, *ex causa lucrativa*, worth 3 or 400 merks by year from his father, and found that his *etas* was not so *lubrica*, nor his counsel so *instabile*, nor his lesion so enorme, as to be restored against that act of caution.

Aff. Gilmer.

Alt. Sinclair.

January 10. 1657.

SOUTHALL contra CUNNINGHAMHEAD.

THE Laird of Cunninghamhead being addebted to the Lady his mother-in-law in 20,000 merks; which sum being moveable, and having by a testament nominating Lord Mauchlin her executor, who thereafter obtains sentence against Cunninghamhead for this sum; and so the right of this sum being established in my Lord Mauchlin's person, my Lord Southall, as creditor to Mauchlin, arrests in Cunninghamhead's hands, and calls him to make it forthcoming; wherein Hew Penengo, as assignee from the creditors, and legatars contained in the Lady's testament; compears, and contends to be preferred to this arrester, and to be answered and obeyed of this sum; because an executor in law, being but a naked office, and being comptable to the legatars-creditors and nearest of kin to the defunct, his creditors cannot affect this sum, nor be preferred to the creditors and legatars of the testator: For it was alledged, if the executor were at the horn, the donatar could pretend no right to this sum, nor the heirs or executors of the executor, in case he died without making compt to the nearest of kin; likeas, the nearest of kin must repeat from them, in case they meddled. Contended on the other hand, The arrester must be preferred, because the executor had acquired *plenum dominium* to the sum, by the sentence above written; and so was arrestable, as belonging to him, and the arrester must be preferred, they not having done the like diligence against the debtor; *et res* as yet being *integra*, and the assignee from the creditors and legatars has an action competent to him against the caution found by the executor, whom he may convene to pay to him the goods confirmed in the testament as accords. *Replied*, An executor could not have *plenum dominium*, being comptable, as said is, and all the *dominium* he has is but *fidei commissum*. This was disputed, but not decided, and it is likely they would have preferred the arrester.

Aff. Fletcher

Alt. Gilmer.

January 12. 1657.

FORSYTH contra TENANTS of HAWICK.

FORSYTH convening the tenants of Hawick for poinding of the ground, *alledged*, There can be no poinding, &c. because the pursuer being infest in an annualrent of thir lands, redeemable upon 5000 merks, he had charged the heritor of the lands, who was debtor, to pay the said sum; which charge is suspended, and is prejudicial to this action, and so he had passed from his real right, in charging for the principal. *Replied*, Notwithstanding that charge, he behoved to have a poinding, because the using of the one, was not a passing from the other; but the annualrenter might return to his real right, though he had required for his principal sum, the requisition being made for the behoof of the relict and bairns, by the heir *quoad* the creditor, but noway to change the nature of the right *quoad* the debtor; since the mobility of the sum by the requisition cannot extinguish the real right, being in the pursuer's option to use both, the one but prejudice of the other. *Duplied*, It was true, a creditor might return to his real right, notwithstanding

withstanding the charge used, and requisition made, *et e contra*; but by returning to one, the other is passed from, but not extinguished; and both cannot stand in law, because then one and the self-same sum should be both heritable and moveable, *quod est absurdum*; for, by using a charge and requisition, if the creditor come to die, the sum becomes moveable, and belongs to his executor, and by granting of a poinding of the ground, it becomes real, and so belongs to the heir of the creditor: But the pursuer's answer should be, That he passed from the charge of horning, in pursuing his real action; and so the cautioner in the suspension compeared and alledged, and protested that he might, free of his cautionry, in respect of the pursuer's return to his real action, which he cannot in law pursue, without passing from the other; *cum nihil pendente lite, sit innovandum*. The Commissioners found the cautioner in the suspension free.

A&A. Syme.

Alt. Wedderburn.

Eodem die.

IN the action, pursued by Campbell and Ker against the town of Dundee, it was found, That direction given by the magistrates to the people of the town, to take away arms from the pursuers, probable by witnesses. The contrary to this, was found, this session, in a contravention betwixt Law and Geddes.

A&A. Syme.

Alt. Wedderburn.

*Eodem die.*M U R R A Y *contra* C A M E R O N.

GIDEON MURRAY, pursuing one Cameron, as cautioner for an apprentice, to make payment to him of a number of goods which his apprentice had taken from him under trust, and for which he had gotten sentence against his cautioner, extending to L. 5000, which is all proven by writ. They assilzied the cautioner, in respect that Gideon, instead of bringing him up as an apprentice in merchandising, he had bred him as a pirate at sea, in employing him to dispose on these goods which he had theftously taken from others during the late troubles.

A&A. Maxwell.

Alt. Norvell.

*Eodem die.*Lady H O U S T O N *contra* ———.

THE Lady Houston pursuing the heirs of the first marriage of her husband, for implement of her contract of marriage, whereby he was obliged to provide her to the annualrent of 17,000 merks, and to employ that upon good and sufficient and well-holden lands or annualrents, and to re-employ it when it should be lifted at the discretion and sight of, &c. *Item*, to provide her to the third of his conquest. The defenders crave the pursuer would condescend what clause was not fulfilled. It was condescended on the annualrent of 17,000 merks, and for the third of Gargunnock being a conquest. *Alledged*, That he had provided her to Gargunnock in liferent, which was better than the annualrent of 17,000 merks, which he had uplifted off the lands of Markinsh, wadset to him, and redeemable by payment of that sum, and had employed it on Gargunnock for her security; and so, being debtor *ex pluribus causis*, viz. for re-employment of 17,000 merks, and for the third of his conquest, his provision of her to Gargunnock ought to be ascribed

ascribed to the *durior causa*, which is the re-employment of 17,000 merks; *nam ubi creditor non dicit acceptum fecisse, lex dicit solutionem adscribi duriori causæ.* They found the defenders liable in the re-employment of the sum, and that the pursuer's possession of Gargunnoch was in lieu of the conquest to which she was provided by the said contract.

A&. Gilmer Alt. Nisbet.

This interlocutor was rectified on a bill.

Eodem die.

IN the foresaid action, Forsyth and tenants of Hawick, it was found, That a creditor comprising the lands whereout of the annualrent was due, after the annualrenter had required the heritor, and charged him to pay the principal, and that before his return to his real action, or passing from his charge of horning; that, in that case, the annualrenter returning any time to his real right will be preferred to the compriser. In that same process, there compeared one who was infest, and in possession of the town and lands of Hawick before his infestment of annualrent; and so craved, that not only he might be preferred to the annualrenter in the duties of the lands, but also that the annualrenter might be discharged in all time coming from poinding his tenants of that land wherein he was infest, &c. long before him, *hoc maxime attento*, that the rent of the land was allenarly equivalent to the rent of his principal sum.

January 14. 1657.

P E T E R *contra* ———.

IN the pursuit betwixt David Peter, &c. it was found, that a husband is only *dominus omnium bonorum mobilium uxoris*, and not *immobilium*, as heritable bonds, unless that she, *ante contractum matrimonium*, expressly assign the same to her husband; and that the husband's creditors could not affect her heritable sums not assigned, as said is.

A&. Gilmer. Alt. Nisbet.

January 15. 1657.

Earl of NITHSDALE *contra* Earl of BUCCLEUGH.

THERE was a bond granted by this Earl of Nithsdale to James Maxwell of Dirleton for L. 500 sterling, for payment whereof the Earl being charged to enter heir to his father, to the effect they might comprise his father's estate from him as heir, or lawfully charged, &c. The Earl renounces to be heir, whereon James gets adjudged to him all lands, annualrents, and reversions, legal or conventional, belonging to his father. Then James disposes the right of that decret of adjudication, with the bond, being the ground thereof, to the Earl himself; and he, as assignee from Mr Maxwell, pursues a declarator of redemption of the barony of Laucholm, wadset by the deceased Earl of Nithsdale to the Earl of Buccleugh, upon the real offer and consignment of the sum whereon these lands were engaged. *Alledged* by the Countess of Buccleugh, No process at his instance upon that decret of adjudication, because the adjudication is purchased against the Earl of Nithsdale, as renouncing to be heir to his father, who *per rerum naturam*, could not have an heir, he being forfeit. *Replied,*
That

That the deceased Earl of Nithsdale was restored in part, and the forfeiture taken off, and he declared to be such a person to whom this pursuer, his son, might succeed, both as to estate and honours. *2do*, No process at his instance as assignee to this bond, granted by himself, and decret of adjudication following thereon; because, *1mo*, it is but a simulate right contrived to the prejudice of lawful creditors, there being no sums of money lent or given to the Earl by Mr Maxwell, though the bond bear sums of money, nor yet any sums given by the Earl to Mr Maxwell for the right of the assignation; and this they referred to the pursuer's oath: And if such fraudulent and simulate ways were sustained as a valid title in law, it would open a door to all the lieges to follow the like courses, and to bruik their father's estates, and shun his burdens. *Replied*, That, grant it were a similar right, yet they were content, that the accepting of this assignation should infer *gestionem pro herede* against the pursuer, and that he should be made liable to his father's debts; and that there could be no way invented in law for him to bruik his father's estate, but by granting this bond, and taking this assignation, which is declared to be but prejudice of his father's creditors, *hoc maxime attento*, that his father was forfeit, and declared traitor; and so this pursuer his son could not be served and retoured heir to him, his father not dying *ad fidem et pacem S. D. N. R.* They repelled the alledgeance, in respect of the reply and declaration, and found process at his instance as assignee. *3tio*, No process because he being made assignee to his own bond, and so debtor to himself, of the law *confusione tollitur obligatio*, and consequently the decret of adjudication, and all following thereon, falls. *Replied*, *Quod licet indirecte licet directe*: if this assignation were granted to a third party, tho' to the pursuer's behoof, it is uncontroverted, that *confusione non tollitur obligatio*; and since that the pursuer has made use of his own name directly to the behoof of his father's creditors, and filled up his own name in the assignation, why should it in law prejudice him? The Judges repelled the alledgeance, and sustained the assignation. Then the pursuer craved the lands might be declared redeemed, upon the real offer of the sum as said is; whereupon they appointed a compt and reckoning, &c.

Aet Maxwell.

Alt. Gilmer.

January 19. 1657.

C L A R K contra C L A R K.

ALEXANDER CLARK of Pittencrief disposes his whole estate to his brother's second son, with this provision, that he should pay to his daughter Marion L. 20,000, and what Sir Archibald Primrose, Mr John Fletcher, and some others should fill up in a blank bond granted apart by him to his daughter, in case she married with her friends consent, and that by and attour the L. 20,000. His daughter being past minority, and the father having left these friends aforesaid to be sole tutors to his brother's son, to whom he had disposed his estate, she raises a summons against her cousin, who got her father's estate, to see and hear it found and declared, That he ought to be personally liable in that L. 20,000, and that the blanks ought to be filled up *ad arbitrium boni viri*; since the persons designed by her father to that effect are nominate tutors to the defender, and would be her debtors in the sums filled up in the blank, and so were parties to her, and they would not fill up a sum answerable to her father's good will towards her, to the prejudice of their pupil. *Alledged*, The pupil needs not be made liable personally, because he was neither heir nor successor, nor any way representing her father, and for what is disposed he is most willing to make it forthcoming to

to her for payment of that sum, *et res ei obligabitur, et non persona*. The Judges repelled this, and found her cousin liable personally to pay the L. 20,000, and to fill up the blanks of the bond. *Alledged*, That, in law, none other could fill them up but the persons particularly named; and the election made by the father of them is exclusive of all others. *Replied*, *In contractibus bonæ fidei, non tam verba quam mens contractus, et voluntas contrahentium inspicitur*, her father intending, if she married well, to bestow more upon her than the said L. 20,000, and she declared she was to marry such a Gentleman against whom there could be no exception, and with whom her father had been well pleased, if he had lived; therefore the blank ought to be filled up *ad arbitrium boni viri*, and not by these who are her parties, and may be liable to pay this sum to her. This was not decided.

January 20. 1657.

Mr FORBES contra Earl of ERROL.

MR FORBES having lent to the Earl of Errol 20,000 merks, for which he takes infeftment out of his lands of an annualrent of 1200 merks, payable at two terms in the year, Whitsunday and Martinmas, with this provision, in case two terms ran in the fourth unpaid, that then Mr Forbes might require his principal sum, and my Lord should be obliged to pay it, with the ordinary annualrent. Mr Forbes, being a Frenchman, conveys my Lord Errol to pay to him the 1200 merks due to him forth of his lands, conform to the contract. He *alledged*, He could not be liable in the haill annualrent libelled, because the money, the time of that contract, gave ten for the hundred; and since now the annualrent was come down to six *per cent.* he could be conveyed for no more but six *per cent.* conform to the act of parliament. *Replied*, He behoved to be liable in the haill annualrent libelled; because this was not *contractus mutui*, but *contractus venditionis redditus annui*, and is called in French *rente constitue rente vendu*, by which my Lord Errol disposes an annualrent out of his lands to this Mr Forbes for 20,000 merks; for in *contracta mutui mutuans potest interpellare debitorem pro sorte, et usuræ debentur ex pacto propter sortem*; but here Mr Forbes cannot call my Lord Errol to pay this principal sum so long as he pays the annualrent: Likeas, *periculum et commodum rei empte sequitur emptorem*; for if the land should lie lee, or the annualrent of money rise, the pursuer would crave no more but his annualrent. *Duplied*, Notwithstanding of the alledgeance, the exception stands good; because, *1mo*, The contract bears borrowed money from this Mr Forbes by the Earl. *2do*, My Lord is obliged to pay him his principal with the annualrent, in case two terms run in the third unpaid. *3tio*, The constant practise of this land finds all contracts of that kind to be *mutui*, as was found in the case of Mr John Hay of Haystoun contra my Lord Balcomy; and so *ubi sunt verba mutuantia et requisitio sortis, et solutio usurarium, ibi est mutuum*; for the case may be put, a woman is infeft in an annualrent of 10,000 merks out of lands, and this annualrent is disposed to her during all the days of her lifetime, with this provision, that how oft the sum shall be uplifted, or the land redeemed, the 10,000 merks shall be as oft employed again on that same or the like security. The life-rentrix can seek no more by virtue of this infeftment but the ordinary annualrent of the sum. The Judges found my Lord Errol liable only in the ordinary annualrent, and found the exception and duply relevant.

A&G. Gilmour.

Alt. Nisbet.

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January

January 22. 1657.

PLUSCARDY *contra* GRANGE.

THE Laird of Pluscardy pursuing the Laird of Grange Dunbar his stepson (for he married his mother) for warrandice of his mother's conjunct-fee-lands, to be worth twenty-four chalders of victual, from the time of the marriage to this time, being twelve or thirteen years, and amounting to a great sum. *Alledged*, No process for bygones preceeding this pursuit; because the pursuer has possessed the land himself the years libelled, and it is to be presumed, that the land was that much worth when he entered to it, and *sibi imputet*, if he has not improved it, but deteriorate the same through his neglect. As for years to come, the defender is content to become his tenant in these lands for payment of the duty contained in the contract of marriage. The Judges assilzied from all bygones, and found he ought to have intented his action of warrandice within three years after the marriage, and that this pursuit for bygones was prescribeable after that time, and found the defender's offer relevant.

Act. Wedderburn.

Alt. Dalrymple.

The like was found in the case betwixt my Lord and Lady Roxburgh.

January 24. 1657.

DE-LA-SAUSE *contra* Lord HADDINGTON.

THE Count De-la-Sause having married my Lady Haddington, and pursuing my Lord to pay him L. 10,000 due out of his lands to his Lady, and now pertaining to him *jure mariti*. *Alledged*, 1^{mo}, No process at his instance for this annualrent, because he was declared rebel by the King of France (who was in league and amity with the Protector, and was joined with the Prince of Conde, now fighting with the Spaniards, the declared enemies of this commonwealth; and so he had not *persona standi in judicio*. 2^{do}, No process, because he is separate and divorced from his Lady, both her person and estate, by act of the parliament of Paris, and her means were declared to belong to herself. *Replied*, His being declared traitor by the Crown of France, makes him not to forfeit his estate in Scotland, no more than a Scotsman declared a traitor here, loses his fortune in France. And the acts of the parliament of Paris cannot reach beyond the limits of France, no more than our laws can reach to them; so that, unless he were also declared traitor to the commonwealth of Britain by the supreme magistrate, he cannot lose any thing belonging to him in Scotland. To the second, Any separation betwixt the pursuer and his lady does not dissolve the marriage, nor take away any right belonging to him *jure mariti* in Scotland; because the divorce is for a civil cause, and not for adultery, and for his joining with the Prince of Conde, as the custom is in France to do the like against all traitors, to the end their wives may not cohabit with them in France; and so his divorce, being for a civil cause, and pronounced by the parliament of Paris, cannot take from him the right of any estate he has acquired in Scotland; for the parliament of Paris has no jurisdiction in Scotland, and any man bruiking an estate in Scotland must be ruled *ratione rei*, according to the Scots law, and not according to the law of the land where he lives; and he must be judged and lose his estate according to the Scots law. This was waved, and not decided.

This custom is founded in the Roman law, *Novella* 117. cap. 8. and 9. Nowhere, they being guilty of and fugitive for treason dissolves the marriage and is a ground of divorce and repudiating.

January

January 26. 1657.

Town of *IRVINE* contra their CRAFTS.

THE town of Irvine pursuing the crafts of the town to pay 500 merks, conform to a seal of cause betwixt the town and crafts, whereby the magistrates of the said town gave the crafts liberty to chuse their own deacon, and to take order with all unfreemen entering the town: They suspended, on this reason, That the magistrates and town promised them a deacon-conveener, which was referred to their oath. The Judges found the town being a multitude, and not *una persona*, could not give their oath, but ordained any of the magistrates then present at the bargain to be examined.

Aff. *Elis.* Alt. *Maxwell.*

Eodem die.

Mistress of *GRAY* contra *POURY*.

IN the foresaid action, the master and mistress of Gray against Poury Fotheringham, to pay 12,000 merks, as heir of tailzie served and retoured to the deceased Poury. *Alledged, Absolvitor*, because the heirs of line to the said Laird having intended a reduction of this bond, granted to them, *ex capite minoritatis*, &c. thir same pursuers compearing, did consent that the bond now craved so to be reduced *quoad eos*; and so the heirs of line, *in ordine*, being first to be discussed, and first liable in payment of the debts of this kind, and having reduced the bond, wherein thir pursuers are compearing, the heir of tailzie must be affoizied; for if he had paid it, then, in law, he had his relief against the heir of line, whereof he is now prejudged by the decret of reduction foresaid, consented to by the pursuer. *Replied*, Notwithstanding of that reduction, the heir of tailzie must be liable, because the bond is granted by the deceased Laird of Poury to the pursuer, with the advice of curators, whereof this defender, the heir of tailzie, was one who consented to the granting thereof, and subscribed the same, bearing this narrative, That for as much as the Lady Poury, now Mistress of Gray, after compt and reckoning, had paid many debts for Poury her son, and that out of her own proper means, for her son's standing, therefore, to be bound and obliged, with the consent of the curators, to pay the said sum; and so this defender being consenter in the bond, and being major, *sciens et prudens*, the time of the granting thereof; and certainly knowing how much this pursuer did for her son's well, and that after compt and reckoning, this bond was found to have been for a cause most onerous narrated in the bond, he, the heir of tailzie, can never be heard to reduce it, *ex hoc capite læsionis*, tho' it be already reduced *quoad* the heirs of line. This was not decided, but agreed; yet they inclined to make the heir of tailzie liable.

Aff. *Gilmor.* Alt. *Wedderburn.*

January 27. 1657.

MAXWELL contra *IRVING*.

IN a pursuit of mails and duties, Mr William Maxwell against Irving, it was found, That though Mr William and his authors were in possession forty years, in the lands whereof the mails were sought, and whereof some other lands were alledged to be parts and pertinents; yet that Irving being

infest,

infest, and seven years in possession, it was sufficient in a possessory judgment.

Aff. Maxwell.

Alt. Gilmor.

Eodem die.

IN a pursuit, at the instance of Home of St Leonards for 5000 merks, and the annualrent thereof, from the date of the bond, it was found, That tho' the bond did bear payment of the principal sum, with the annualrent, yet their being no express clause nor obligation for annualrent, that the debtor was not liable therein.

January 30. 1657.

M'PHERSON *contra* SCRYMGEORS.

DOUGAL M'PHERSON having married the relict of Major William Scrymgeor, pursues the children, and their tutor Alexander Wedderburn of Kingennie, for implement of the contract of marriage. *Alledged* for the tutor, He could not be liable *personale actione* as tutor; because he had neither meddled nor intromitted with any thing pertaining to the pupils; and so, if the pupils have not wherewith to fulfil their mother's contract of marriage, it were injustice, either to take his person, or to affect his estate therefor, especially seeing he had his fingers free. The Judges found him, as tutor *personali actione*, liable for what only he had meddled with, or should intromit with of the pupils.

Aff. Nisbet.

Alt. Wedderburn.

February 1. 1657.

CALDERHALL *contra* Lord BLANTYRE.

MY Lord Blantyre having disposed some vicarage-teinds to Hary Elphinston, with warrandice at all hands, except of such a person, and thir lands being evicted by the minister of the parish for his glebe, Calderhall conveens Blantyre to warrant. *Excepted*, He cannot be conveyed for warrandice; because by no fault nor deed of his are the lands evicted, but, by act of parliament *James VI. Parl. 14. cap. 146.* it is ordained, that vicars lands be subject to ministers unprovided, which my Lord could not hinder. *Replied*, There being only one exception in the warrandice, *exceptio in non exceptis, confirmat regulam.* *Item*, The law being made, before the disposition containing warrandice, the disposer ought to have looked to himself before he had given such warrandice. It was confessed, that, if by a law subsequent to this bond of warrandice, the lands disposed had been evicted, that the disposer could not be tied; but the warrandice being *post legem latam*, the defender must be liable; whereas, in justice, he cannot be tied to warrant lands *contra legem ferendam*. The Commissioners repelled the exception, in respect of the reply. Then *alledged*, He cannot be bound to warrant now, because he should have intimate to him the process of eviction, who would have maintained him against the minister, and so *sibi imputet* that the lands are evicted. This was laid over.

Aff. Elph.

Alt. Maxwell.

February

February 2. 1657.

BRISBANE contra ———

JAMES BRISBANE, and his curators, pursuing a reduction of a testament made by his father, in favours of John Brisbane his bastard son, wherein the father was alledged to have nominate his said son executor-legatar, and tutor to his lawful son James. Found, that a testament, tho' suggested to the defunct by question or interrogation, was valid, unless it were alledged to be extorted by force or fear; and that the intervention of extraneous acts in the making of a testament, renders it not null; and that there was no necessity to libel *unitas actionis in fatione testamenti*, or that the bequeathing of a man's moveables requires so great a freedom, as to exclude counsel or suggestion to a defunct on death-bed, or that *defectus clausulæ derogatoriæ primi testamenti facti in favorem liberorum*, renders a second testament null; nor that the defects of his memory in the upgiving of his debts was any way a presumption of his not being *sanae mentis*; and that a testament made in Scotland requires less solemnities than the civil law ordains, because by it a man had power to nominate his successor *in immobilibus*, which by ours he cannot do.

Ast. Dunmure. Alt. Dalrymple.

February 24. 1657.

EDGAR contra IRVING.

EDGAR, as assignee from ——— having charged Irving to pay the sum of ——— he suspends upon compensation of the like sum resting by the charger's cedent to him. Answered, The compensation cannot meet this debt, because, it is offered to be proven, the suspender is resting another sum to his cedent, which in law ought, and must compensate this debt, and which debt is *debitum æque durum et antiquum* to this debt assigned; and so the charger's cedent having wherewith to recompense this compensation, the debt must be ascribed to what is resting to the cedent, and cannot in law compensate this debt assigned. The Judges found the compensation relevant, and assigned a day to prove.

Eodem die.

IT was found, that a bond granted by an interdicted person, can be no ground whereon to comprise his land, or take his person, but only to affect his moveables; and that an interdiction published at the head-burgh of the shire where the interdicted person lives, is sufficient intimation to all the lieges, though dwelling in another shire; and that the interdicted person have lands in divers sherriffdoms.

Ast. Syme. Alt. ———.

The contrary hereto is found on the 15th February 1658, Ramsay.

February 26. 1657.

The Countess of BUCCLEUGH contra RENTON, &c.

THE Countess of Buccleugh being addebted to the Laird of Lammer-ton in L. 10,000, and he assigning it to Anna Renton his daughter,
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for her provision, the Laird of Renton, creditor to Lammerton, having inhibition against him before the assignation, at least the intimation thereof, to the young Countess of Buccleugh, who is a pupil, and debtor of the sum: Likeas, another creditor of Lammerton's having arrested the money in the Countess her hand before the intimation of Anna's assignation, as said is; and they all contending for the same, the case being a multiple-poining, Anna *alleged*, She ought to be preferred, &c. in respect of her assignation, and intimation thereof to the Countess, at least to her tutors personally. Renton craved preference, because of his inhibition *ut supra*. The third opposed his arrestment, and the sum was sufficient to pay both thir creditors, and they concurred against the daughter assignee. So the question was, *1mo*, If an inhibition could hinder or take away assignations made to bonds; since, by common interpretation, they are only extended to lands and heritages? *2do*, If an intimation of an assignation made to a tutor only, and not to a pupil, be a valid intimation in law? and whether he who arrested in the pupil's hands, tho' long after the intimation made to her tutors, ought to be preferred? It was, after much debate, found, that the inhibitor and arrester had best right to the sum, and they were preferred to the daughter, who had purchased a right from her father for no cause onerous at all; and that the intimation made to the tutor only was not relevant in law; *nam pupillus post septennium* (as the Countess was) *intelligitur habere consensum, et potest obligari cum auctoritate tutorum; et post septennium non potest obligari sola tutorum auctoritate; sed necesse est adhuc, ut res pupillares obligentur, ut accidit consensus proprius pupilli.*

A&C. Gilmer, Nisbet, & Wedderburn.

Eodem die.

IN a case betwixt a master and tenant, it was found, That, in a tack, obliging the master to free and relieve the tenant of all burdens imposed, or to be imposed upon him, the obligation only extends to taxes and burdens following the land, but not to coal, candle, and transient quarterings, which are the tenants burden, and not the master's.

A&C. Dalrymple. Alt. Syme.

Eodem die.

T U R N B U L L *contra* C R A N S T O U N.

TURNBULL pursuing improbation of some rights of lands possessed by my Lord Cranstoun, and in the production he calls for a doom of forfeiture alleged given against this Turnbull's predecessor, by my Lord Cranstoun's Goodfire, as my Lord Dunbar's Lieutenant in the south; and some of the writs called for being produced, the pursuer craved certification *contra non producta*: The defender *alleged*, That he having already produced some writs before any certification could pass, he behoved to see his own production; which was granted. Then *alleged*, No certification, because all the writs he was obliged in law to produce are produced; and for the doom, he is not obliged to produce it, because it is forty years since it was pronounced; and so *post tanti temporis intervallum*, no certification of improbation can pass against him for not production thereof. Likeas, The lands upon the gift of forfeiture has been bruiked and possessed by the defender and his authors thir forty years; and so, by act of parliament, the right is prescribed, *James VI. parl. 22. cap. 12. Replied*, Falshood is not prescribeable by

by that act of parliament; and, by the law, improbations may be pursued at any time, though the lands (whereof the rights are craved to be improven) be possessed forty years without interruption. The Judges desired to hear this *in presentia*.

A^ct. Dalrymple. Alt. Gilmer, & Syme.

June 10. 1657.

B R O W N *contra* B R O W N.

BROWN in Gorgymill pursuing Thomas Brown for 1300 merks, contained in a ticket obliging him to pay that sum to the pursuer for ale he had given out as his servant. *Alledged, Absolvitor*; because he was content to give him account of 1300 merks of ale sold to customers as his servant; and so, being *præpositus huic negotio*, he could not be liable *personaliter* for the sum, but only to compt and reckon. The Judges found, notwithstanding of the ticket, the parties ought to compt; and that it was sufficient for the defender to give him an account to whom he sold the ale.

A^ct. Gilmer. Alt. Dalrymple.

June 11. 1657.

J O H N S T O N *contra* J O H N S T O N.

JOHNSTON having bound himself to cause the tutors nominate to one Johnston to make compt and payment of their intromission to the pupil, when he was past pupillarity, and being conveyed by the pupil for whose behoof the bond was granted for performing it. *Alledged*, The tutors themselves behaved *primo loco* to be discussed, and that he could be in no worse case than if he had been cautioner for the tutors, where he would have *beneficium discussionis*. This they found relevant, and ordained the tutor to be discussed *primo loco*, as said is.

A^ct. Syme.

June 12. 1657.

R O S W A L D *contra* _____

MR ROSWALD pursuing a declarator of expiration of a comprising, on this reason, That the sums wherefore the lands were comprised were satisfied by intromission with the mails, &c. *Alledged* by Mr Thomas Henderson, who compeared, That there could be no declarator against him, because the right of the comprising, standing in his person, was not yet satisfied by his intromission. *Answered*, That it was enough to say, that the right of the comprising standing in his person was satisfied; for having the first apprising on that land, and the pursuer being the second and next to him, any other right of apprising he has purchased posterior to the pursuer's, though not satisfied, cannot in law impede this process against the first comprising; and he cannot ascribe his intromission to both, one being in time posterior to the pursuer's right. This the Judges found relevant.

A^ct. Dalrymple. Alt. Hog.

June 13.

June 13. 1657.

ROSWALD contra REIDHALL.

NIMBO, debtor to Reidhall in L. 200 Sterling, borrows from Mr Roswald as much corn as would sow a room set to him in tack by the Laird of Wariston, and for his security dispones the haill increase and growth of the corns, with the plenishing, to Roswald. After the corns are sown, and cut down, Reidhall pouds them, as belonging to Nimbo his debtor; and being conveyened for a spuilzie, he opposes this pouding. *Replied*, The corns and goods could not be pouded for Nimbo's debt, because they belonged to the pursuer, and he kept them with his own herd, did sow the ground with his own seed, paid the servants for sowing, harrowing and shearing, &c. *Answered*, Nimbo was tenant of this land, and had a tack of this ground from Wariston for years to run unexpired, and that he had been in possession five years, and is yet. *Alledged*, The corns were disponed by Nimbo, and the time of the pouding, the pursuer's servant compeared, and produced the assignation, and made faith the goods belonged to the pursuer. *Replied*, *Non relevat*, unless Roswald himself had compeared and made an oath, not only that the goods pouded were disponed to him, but that they were delivered to him by Nimbo, *quia sola traditione transfertur dominium*; or else he should have given a procuratory to his servant to compear. The Judges, before answer, ordained the pouding to be produced.

Act. Dalrymple.

Alt. Gilmor.

June 16. 1657.

PHILORTH contra Lady of LUGTON.

THE Laird and Lady Lugtons having wadset to Philorth some lands which were set in back-tack to the Laird and Lady jointly for payment of the annualrent. The Lady, after the Laird's death, is pursued for the back-tack-duty. *Alledged*, *Absolvitor*, because she bruiked the lands *alio titulo*, viz. by a right flowing from her husband in liferent before this wadset. *Answered*, By accepting this back-tack she had homologate the right made to her by Philorth: Likeas, She renounced her liferent, and got this back-tack in remuneration thereof. *Replied*, Any acceptance of a right by a woman, *stante matrimonio*, can bind nothing upon her after she is loosed from her husband; and that renunciation was reducible, being *ob metum et reverentiam maritalem*. Likeas, She had reduction of it, and she was content to renounce the right of that back-tack. The Lords found her liable *in quantum lucrata est*, reserving her reduction as accords.

Act. Dalrymple.

Alt. Syme.

June 20. 1657.

NIDDERY contra HYSLOPS.

THE Laird of Niddry and other creditors, comprisers of Mountainhall, having entered into a contract to divide the lands of Mountainhall, which lies run-rigg, conveyens Hyslop for dividing the lands. *Alledged*, No division, because it is not *habilis modus* of the law to divide lands, but it must be by way of brieve out of the Chancery. Likeas, By the *reddendo* in the charter, the vassal cannot change nor wadset his lands, without his superior's consent. *Answered*, No need of a brieve, because there is no division of

of the property craved, but only of the possession, and when it is divided, there will be no need of a new charter from the superior. The Judges ordain the creditors to divide.

Eodem die.

SMALL vicarage are not commonly extended to every thing growing or being in a parish, as horse, nolt, sheep, hemp, lint, wool, eggs, goose and gryce; but use and wont in parishes rules these things.

June 24. 1657.

B I C H I E contra H A R P E R.

BICHIE and Mosley *contra* Harper, who being conveyened to pay L. 200 Sterling, resting by Mary his wife, conform to a bond granted by her in her widowhood to this Bichie and Harper, being *stante matrimonio*, pursued therefor before a Judge-competent in England, he promises to pay the sum; upon which promise he is now conveyened. *Alledged*, This promise is only probable *scripto vel juramento*. *Replied*, It being made in England, *ratione loci contractus*, it was probable by witnesses, though the sum exceed an L. 100 Scots, which in our law can only be so proven. *Duplied*, Though, in England, a promise be probable by witnesses, yet by that same law a verbal promise, made to any, not being pursued upon within six years after it is made, does prescribe; *ita est*, it is six years since this promise. *Triplied*, The law of England anent prescriptions is only of debts owing by promise, but not of debts owing by writ; but the ground of this debt now pursued for, is a bond formally granted by his wife, and the promise is but an accessory obligation to that former bond granted by his wife, whom he afterwards married. *Quadruplied*, He was not conveyened on that title, but he was now conveyened *super promisso* allenarly, which being prescribed by the law of England, he must be assoilzied. *Alledged*, The prescription was interrupted within these six years required by the law of England, by a citation of Harper to pay it before a Judge-competent. *Answered*, He behoved to say he was pursued to pay this sum, on this same title of a promise; for if he was conveyened *super alio medio* than the promise, it was not relevant to interrupt the prescription foresaid: For put the case, he had been conveyened upon the bond *post dissolutum matrimonii* but after the years of prescription, and had been assoilzied, and thereafter had been conveyened upon a promise after the prescription, can the pursuit from which he was absolved, or might have been absolved, be a sufficient interruption of the prescription, now competent to him against the promise. *Triplied*, His being pursued on the bond granted by his wife within the years of prescription was sufficient to interrupt the prescription competent to him against the promise, the one being the principal bond, and the other but *accessorium*, *viz.* the promise; because prescriptions are odious in law, and any citation, *super quocunque medio*, is relevant to interrupt them. For the case was put thus, An executor being conveyened to pay a sum, and assoilzied, thereafter being conveyened as heir to pay the same sum after forty years, it is no way competent to the said heir to alledge prescription of forty years; because he was conveyened as executor to pay that same sum within the forty years, and that pursuit against him as executor interrupts the prescription, when he is pursued as heir. For one may be pursued *super uno*, and assoilzied *super alio medio*; but the case was not alike here, because both these *media* are proven by writ, *viz.* that

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he is heir or executor; but here is *diversum medium quo, et diversum medium quod*. They in the first pursuit, being the bond granted by the wife; in this the *medium quod*, is the promise. *Alledged*, This pursuit being betwixt English parties, and dipping on the meaning of the English, how far prescriptions may run, it ought to be remitted to the Judge-ordinary in England. Yet they assilzied the defender, in respect of the statute of England produced, bearing prescription of verbal promises within six years; which was well decided.

A&A. Gilmor.

Alt. Fletcher.

June 30. 1657.

SINCLAIR *contra* the Laird of WEDDERBURN.

IN a valuation of teinds, where the titular has been 15 years in possession of the teinds craved to be valued, before the act of parliament 1628, he will be preferred to the sole probation of the worth of the teinds. But if the heritor has been seven years in possession of his teinds, before the 15 years that preceeded that act, there will be a joint probation ordained both to titular and heritor. In this process also the Commissioners gave warrant to Mr Robert Sinclair to draw his own teinds, during the dependence of this valuation; he finding caution to pay the just value of the same, after sentence, to the titular. This was done on a declaration given by Mr Thomas Murray, who was clerk to the old commission, bearing that to be the custom.

A&A. Sinclair.

Alt. Norvell.

July 1. 1657.

FLEEMING *contra* REID.

THOMAS FLEEMING, charging Andrew Reid to pay him 400 merks contained in his bond, he suspended, because the true cause of that bond was for wine, and he offered to prove the wines were sophisticate, rotten and mixed, which was found relevant to be proven by witnesses, though to take away a bond, if the wines were so at the time of their delivery.

A&A. Fletcher & Gilmor.

July 3. 1657.

MAURICE TRENT *contra* ROBERT YOUNGER and HARRY BRUCE of CLACKMANNAN.

MAURICE TRENT pursues the said Robert Younger for payment of a certain sum of money due to the pursuer by bond, and also the Laird of Clackmannan, as becoming surety for the said Robert; in so far as, by his missive, directed to Robert Bruce merchant, he ordains him to deal with the said Maurice, to continue the said Robert Younger's business till Martinmas or thereby, and to assure him that Robert Younger was able to take course with all his burdens, and ten times more, if he could get his own; and to assure him the rumour of his ill condition was false; whereby the pursuer offered to prove, by the oath of the party, *viz.* Robert Bruce, the person intrusted, that he shewed the letter, and required the delay, and obtained it; and that thereafter, within a time, or at least a year, the said Robert Younger became insolvent, by having his lands apprifed, or at least disposed, or himself inhibite or denounced. To the which it was *answered* for Clackmannan, That the alledgeance is no way relevant, seeing the words of the letter are not

not obligatory, but affirmation or assertion, and any assurance in that way, unless it appear to be given *animo obligandi*, or any desire of forbearance, cannot oblige the person so assuring or desiring to pay the debt, if it be other-ways. The Commissioners found the assurance and desire of continuation contained in the letter not obligatory to infer payment of anterior debts, though Younger became insolvent *medio tempore*; and therefore assoilzied the defender.

Balfour, Clerk.

Eodem die.

PATRICK SCOT of Carlton against his CREDITORS.

THE said Patrick pursuing liberation, suspends, *cessio bonorum*; it was alledged for the creditors, first, no liberation till the pursuer give up an inventory of all his estate that he had, not only at the time of the incarceration, but of the denunciation, and produce all the rights and evidents thereof, he then had. 2^{do}, No liberation, because by his bond granted to one of the creditors, he hath renounced the benefit of *cessio bonorum*, and all suspensions and actions, and that under the pain of perjury and defamation. 3^{tio}, No liberation, because the creditors offered to maintain him in prison. It was answered for the prisoner, to the first, That he opposes the common practise, whereby inventory is only desired of rights competent at the time of incarceration, and deeds fraudulent after incarceration, but not after denunciation. To the second, The bond is null, because it is against the common law, and that personal liberty, which no man can take from himself, or oblige himself to remain in perpetual imprisonment. The Commissioners repelled the first defence and also the second, in respect of the bond, which bore not a renunciation of *bonorum*, but of all actions and suspensions that might hinder payment; and sustained the third to such creditors as would become acted for maintenance.

Eodem die.

MARTHA POUT and her CHILDREN contra THOMAS ROBERTSON and the TENANTS of BOGYNE.

THE said Martha, for herself, and for the behoof of her children, being infest by a contract of wadsett betwixt her and Hugh Campbell of Doucathill, in the lands of Bogyne; which contract contained a back-bond, and clause of requisition; she thereupon pursues the tenants and Thomas Robertson, who had bought the lands from Doucathill, as intromitter, to pay the back-tack-duty. It was alledged, for the defenders, *Abolvitor*, because the pursuer had used requisition, and so had made the sum moveable, and had taken away the real right of wadset, in respect the clause bore, if that she choose rather to have the money than the wadset, she should require it. It was answered, for the pursuer, That the alledgeance was not relevant, because the requisition was not a passing from the infestment; and as for the words of the clause *choosing rather*, it is clear that the election is rather of payment; and therefore, unless it be rather alledged, that, by the requisition payment be obtained, *non-relevat*. The Commissioners repelled the alledgeance, being only upon the requisition. It was now alledged for the tenants, that they had paid *bona fide* to Thomas Robertson, now their master. It was answered, That the pursuer had arrested before the time called for upon the contract of

of wadset which includeth the back-tack, and so put the tenants *in mala fide*. It was *answered* for the defenders, That the arrestment upon the contract of marriage, was not for making forthcoming the back-tack-duty, but the rents due to Ducathill, for satisfying of the principal sum due by him. The Commissioners found the said arrestment not sufficient to put them *in mala fide*, or to pay the rents to Robertson, who was not a singular successor.

July 10. 1657.

ALEXANDER FERGUSSON *contra* JAMES SETON
of TOUCH.

THE said Alexander pursues exhibition and delivery of a minute betwixt him and Touch, that it may be registrate and extended, and that because it was put in the hands of Hugh Paterfon simply to be given up to the pursuer, as his own writ. Touch insisted in his process, alledging that the minute was deposited in the hands of Hugh Paterfon 'till certain conditions were performed, and offered to prove the same by the depositar's oath or the communer and witness inserted; and likewise the said Alexander declared to the Laird of Carden, that he would not make use of the minute, and offered to prove the same by witnesses. The Commissioners preferred the said Alexander Fergusson on probation of his libel by the said Hugh Paterfon's oath, and found the declaration not probable by witnesses.

Eodem die.

MARGARET GRADEN *contra* CHEISLY.

MARGARET pursues the said Cheisly for restitution of certain goods, taken from her husband by him in *anno* 1647: The Commissioners found the defence relevant, That, at the time of the taking thereof, the pursuer's husband was actually in arms with Montrose, without necessity of alledging the defender was in arms for the Parliament, (presumed without probation) or did it by warrant, because of the thirtieth act of Parliament 1647, whereby all goods taken from any in the rebellion by any good people, under the obedience of the Parliament, were declared not to be pursuable civilly or criminally at the instance of the rebel.

Balfour, Clerk.

Eodem die.

The Laird of GLENORCHY *contra* CAMPBELL.

GLENORCHY pursuing a removing of the said Campbell from the land of Arthumiar. It was *alledged* for the defender, *Abolvitor*, because Glenorchy, by his bond, was obliged to infest the defender in these lands by a precept of *clare constat gratis*; and therefore could not remove him therefrom. It was *answered* for the pursuer, That the allegiance is not relevant, it being only a personal obligation to receive him, and no real right; but, when he pursues upon the bond, he shall have an answer. *2do*, The bonds, and all the defender's infestments, titles, rights and securities, containing the lands of Archiar, are improven by a decret of improbation in 1648. It was *answered* for the defender, That though his bond was but personal, yet it is sufficient to exclude the grant thereof, in the same manner as if he would

would make a disposition, it would be. *2do*, As to the improbation, there is neither general nor particulars in it of *bonds*, but only rights and securities of and concerning lands; which, in a matter so odious, ought not to be extended to this bond. *3tio*, The defender hath action of reduction of the said decret of improbation already depending and seen, and holds the production satisfied by the decret of improbation produced, and repeats his reason, *viz.* That the decret of improbation is in absence, and only by certification, against which he ought to be reponed; because he produceth a testimony, and offers him to prove, that at the time of the certification, and before he was in captivity taken with Allaster M'Donald in the country service. The Commissioners found the reason of reduction relevant, and also sustained the same, by way of reply, in the removing; and as to the general clause, they were of opinion, that it might extend to the bond as well as to the disposition, being a security of land.

Dounie, Clerk.

Eodem die.

JOHN THOMSON *contra* Sir GEORGE SETON.

JOHN THOMSON pursuing Sir George Seton for an accompt of furnishing part to himself, and part by his command and direction to his sister's daughter: It was *alledged* for Sir George, That the accompt, or a great part thereof, was three years or more before pursuit, and therefore only probable *scripto vel iuramento*; and that member thereof concerning the direction to furnish his sister's daughter was only so probable. It was *answered*, That the accompt was a current-accompt of ordinary furnishing by a taylor; so that it was sufficient the cause was intended within three years after the furnishing. The last of which was sustained. It was further *alledged*, That the direction, being of a small matter, within L. 100, was probable by witnesses. The Commissioners found it was probable by witnesses, unless it were *alledged*, that his sister's daughter were in family, or that it was proven by writ or oath of party, that he had given direction to furnish her in the like kind.

Eodem die.

JAMES CARMICHAEL *contra* his CREDITORS.

THE said James, craving liberation, suspends *cessione bonorum*. Some of the creditors offering to aliment, it was *alledged*, That he ought to be detained, seeing the offer was but by few, and that upon malice. *2do*, He was a public servant, *viz.* a messenger or macer of Exchequer. The Commissioners sustained the offer of aliment, though by a few, but modified, in respect he had wife and children, ten-pence a-day.

July 11. 1657.

OLIVER *contra* FALCONAR.

MADAMOISELLE OLIVER pursuing Sir John Falconar, it was found, That a bond being once depositate, though on conditions, *et quocunque modo* come in the party's hand to whom it is granted, it cannot be taken away, but by the party's own oath in whose hands the bond is, neither can the depositar's oath nor any others be taken, either anent the truth of the depositation or the conditions. Whereas, the granter of the bond calling

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for exhibition and delivery of the writ depositate on certain conditions, the depositor's oath may be taken anent the conditions of the deposition. The like was found betwixt the Laird of Touch and Fergusson against Hugh Paterfon.

Act. Ellies.

Alt. Fletcher.

July 14. 1657.

THOMAS FLEMING contra ANDREW REID.

THOMAS FLEMING, having charged Andrew Reid upon a bond of L. 864, Andrew suspended, and *alleged*, the cause of the ticket was for wine, which he bought at a full price, and which, at the time of the delivery, must be presumed to have been insufficient, mixed and rotten; because, immediately after the same was come from Leith to Perth, where it was delivered within few days, it was offered to be proven by many witnesses, that it was so found insufficient. It was *answered* for the charger, That the reasons were not relevant by witnesses, or presumptions, to take away his write; and that the manner of probation could not be divided, by proving the cause of the bond by the party's oath, and the insufficiency by witnesses. The Commissioners found the reasons so qualified not relevant, unless it had been positively *alleged*, That at the time of the delivery, the wine had a latent insufficiency.

Balfour, Clerk.

Eodem die.

WALTER DUNCAN contra JAMES ELLIES.

WALTER DUNCAN pursues Mr James Ellies, heir to James Ellies his father, who became acted cautioner, in the books of cautionry of borrows, for umquhile James Ellies factor, that he should perform his duty and factorship, and make compt and payment of the goods received by him from the merchants, for payment of 32 barrels of salmon, which the factor received, and for which the pursuer obtained decret against him. It was *alleged* for the defender, No process till the factor or his heir be discussed, seeing the defender's father, being cautioner for the factor, was but liable *subsidiarie*, as cautioners for tutors, curators, and other executors, are. It was *answered* for the pursuer, That he craved sentence, conform to the bond of caution. *1mo*, To make James Ellies to make compt and payment. *2do*, He had recovered decret against the factor, and getting farther notice, that he was bankrupt, farther discussing was needless. The Commissioners sustained the defence, and found no process till decret be gotten against some representing the factor, and they legally discussed.

Balfour, Clerk.

Eodem die.

Earl of HOME contra ANDREW HOME.

THE Earl of Home and his assignee, having charged Abraham Home upon decret of the sheriff of Berwick, for payment of 100 merks yearly for the teind-duties of the lands of —, the said Abraham raised suspension and reduction upon iniquity, *viz.* That he had compared before the sheriff and opposed this relevant defence, That there was a decret at the instance

instance of the Earl for 50 merks yearly standing; against the which the sheriff had admitted this reply, That since the decret, he had paid a great duty, and received the Earl's discharges, to be proven by witnesses, which was not relevant to take away his decret. The Commissioners found the reasons relevant, and therefore suspended and reduced.

Dounie, Clerk.

July 16. 1657.

ROBERT BAILLIE *contra* JOHN HALLEY.

MR ROBERT BAILLIE having obtained decret before the sheriff against the tenants of Cowdecony, and the same being suspended by John Halley of Jenip, who *alleged*, That the tenants could not be removed, because they were his tenants, by payment of mails and duties, and he not warned; and that he was heir or apparent heir to — Halley, who died infest in the said lands; and by virtue thereof, he and his predecessors were in possession ten or more years. It was *answered* for the charger, That the reason was not relevant, unless the suspender or his predecessor had right, and that he was in lawful possession the time of the warning, which could not be alleged; because he offered him to prove, that the charger's father had obtained decret of removing from the lands against the said — Halley, whose rights the suspender claims, after which decret, the suspender's possession was vitious and violent; and the charger needed not warn and call him, seeing his predecessors were already removed. It was *answered* for the suspender, That his possession was lawful, because the said present decret of removing was suspended at his predecessor's instance, shortly after the pronouncing thereof, which is not yet discussed; and which purged his vitiosity following upon the decret of removing: Likeas now he hath intented reduction of that decret, and of the charger's whole right; whereupon he is willing to insist. It was *answered* for the charger, That the suspension cannot purge the vitiosity of the possession, because the decret of removing is *in foro contradictorio*, which could not be taken away by suspension, there being no reduction but now of late: and so, seeing a suspension purgeth not possession thereafter, but that if the letters be found orderly proceeded the possessor is a vitious possessor, and liable for violent profits; and that this suspender against a decret compearing, if the reason thereof were repeated, cannot but be repelled: of necessity the possession remains violent and vitious, and the late reduction should take effect from the time of citation; it cannot purge the anterior vitious possession, whereby to make ten years lawful possession. The Commissioners repelled the reason of suspension founded upon the defenders author's infestment, in respect of the reply of the decret of removing against that author, and repelled the allegation upon the prior suspension, reserving reduction as accords.

Dounie, Clerk.

July 18. 1657.

Sheriff of BUTE *contra* Tenants of CROIGTON.

THE sheriff of Bute being infest in the mill of Croigton, pursues the tenants of the barony of Croigton to pay the abstracted multures. It was *alleged* for the tenants, No process, because their master the Laird of Humbie was not called; without which no service nor thirlage could be put upon his lands. It was *answered* for the pursuer, That he needed not call

call any other than the possessor in his possessory judgment, wherein he libelled he was in possession of the multures, and craved the abstracted multures for the year bygone, and was not craving to constitute a new thirlage, or to declare the point of right; and *alledged*, That the proponers were employed by Humbie, and might propone the defence upon his right, which should have an answer. The Commissioners found no process till the heritor was called.

Eodem die. The same found in the process at the instance of John Reid of Balhothingall *contra* tenants of Burnhead and others.

Eodem die.

ARCHIBALD SYDSERF contra FRANK ADAM, &c.

IN a double poinding, raised at the instance of Archibald Sydeserf *contra* Frank Adam on the first part, John Craichman as son and administrator to Josias Craichman his father on the second part, and Richard Graham arrester on the third part. The ground of the question was a bond granted by the said Archibald to the said Frank Adam and umquihile Josias Craichman, and their heirs, for merchandise received from them; which was arrested by the said Richard Graham, upon a bond due to him by the said Frank Adam and Josias Craichman. It was *alledged* against the arrester, that he ought not to be preferred upon his arrestment; because he had recovered no decret against the said Frank Adam and Josias Craichman his debtors; and therefore no process to make arrested goods forthcoming, being necessarily constitute upon a decret for establishing the debt; till that were done, he had no interest; for the bond whereupon he had gotten arrestment was neither registrate nor registrable, because there can be no process upon an arrestment founded upon a dependence, till decret be first recovered upon that dependence: so, neither upon this bond, which is no decret until *via actionis* decret be obtained. It was *answered* for the arrester, That he opposed his summons for making arrested sums forthcoming, wherein the said debtors were called, and the debts sufficiently instructed by the bond, tho' not registrable; and offered, if need were, to eik that member to his libel at the bar, and then for decerning the sums forthcoming for satisfying thereof. The Commissioners found both these members relevant and consistent in one libel, and, with consent of the other party, ordained the same to be added without fight. It was *alledged* for the said Frank Adam, That he ought to be preferred to the whole sum, first to the arrester, because he offered to prove the debt was paid. *2do*, To John Craichman, because by the law of England, a bond granted to joint creditors, without mention of any proportion or division, if any of them die, their portion accreseth to the survivor, who hath only right to pursue and uplift the same; which was referred to the English Judges on their proper knowledge. It was *answered* for the said John Craichman, That the alledgeance upon the law of England ought to be repelled, albeit it be the common rule in partnership. *vid. Littleton.* *2do*, It was *alledged*, That this bond being granted by a Scotsman, and registrable in the Session-books of Scotland, was thereby submitted by the creditors to the law of Scotland, and regulable thereby; by which it was evident, that this bond belonged to the two creditors and their heirs equally, and did not accresc. *3tio*, It was *alledged*, That the said Frank Adam survivor *non habet personam standi in judicio*; because he is outlawed by outlawry produced. *4to*, The attested copy of a commission granted in the bench, to certain persons to uplift the said Frank Adam's whole estate;

estate; therefore, it was bankrupt to the behoof of Craichman and others his creditors: Likeas compearance was made for the said particular commissioners, and they craved preference, and offered to produce the particular commission *cum processu*. It was *answered* for Frank Adam, That the cause is not regulate by the law of Scotland, seeing the creditors were Englishmen, and the bond granted in England; and albeit it was a Scots name and registrate in Scotland, yet it was only as to execution, but not to change the nature of a right by a law, not known nor thought upon by the said two joint creditors; and to the outlawry, the same had no force in Scotland, being only a personal exclusion in England; and as horning registered in Scotland, and as to the commission thereof, the copy produced cannot be respected, *1mo*, Because it is a commission by Judges in England, which doth not extend to Scotland. *2do*, Because, in all double poindings, the competitors must *in initio* produce their rights, which cannot be instructed by a copy. *3tio*, These Commissioners are strangers, and there must be a procuratory produced for them. The Commissioners found the cause regulable by the the law of England, and that cause of merchandise and copartnership therein, was an excepted case; and therefore found, that Craichman and Adam ought to be preferred in equal shares, and repelled the alledgeance upon outlawry, and sustained not the interest upon the commission granted in the upper bench. Thereafter it was father *alledged* for the said Frank Adam, That he ought yet to be preferred to the other half; because he offered him particularly to prove, that, by the custom of London, bonds granted to joint creditors, who are also copartners, the one deceasing untested, his portion accresses to the survivor, and that this was a copartnery in equal shares. The Commissioners found the alledgeance relevant to be proven by the judgment of the Aldermen and Mayor of London by the mouth of the Recorder, and granted commission to that effect.

Eodem die.

IN a suspension and reduction upon a reason of circumvention. It was *alledged*, That the suspender being cautioner for her husband in a sum of money by bond, after his death, the charger having presented to her, that he would be willing to quite her for this which was a lesser sum, and she, being a woman, ignorant that by the law she would be free of the obligation, granted this new bond, but upon this condition, That she might resele within a certain short space, within which she did resele; whereupon the charger, in presence of several famous witnesses, took a writ, as being her new bond, and having shewn it before them to destroy and cancel the same as the true bond, which was but a forged bond, he keeping up the real bond which is now charged upon. It was *answered* for the charger, That the reason is only relevant to be proven by his oath, and that witnesses cannot take away his bond. It was *answered* for the suspender, That this, being matter of fraud and circumvention, ought to be probable by witnesses, especially, seeing the condition of the granting the bond is offered to be proven by the charger's oath, and the fraud or cancelling of the wrong bond by witnesses above exception. The Commissioners found the reason relevant to be proven by oath and witnesses as is aforesaid; but found not that member relevant, That the bond was granted for a former bond, whereby she was not legally bound, being *ignorantia juris quae neminem excusat*.

*Eodem die.*The Laird of LOUSTON *contra* the Earl of ERROL.

THE Earl of Errol being pursued by the Laird of Louston as heir to his father, and an exception of payment being proponed, and incident sustained to the Earl, in respect he was cautioner; in which incident, two terms had been already granted for exhibition of the discharge against all havers contained in the incident, the Earl craved a third term. It was *alleged*, That no third term could be granted, because, by act of Sederunt anno 1652, only two terms were to be granted in ordinary summonses, and there could no more be granted in an incident, being but an ordinary summons. It was *answered*, That the act made no mention of incidents, but more times were always accustomed in them. The Commissioners granted a third term.

July 20. 1657.

L. D R U M *contra* ———.

SOMERVAILL of Drum *contra* ———, in this case it is found, that where there is a decret *cognitionis causa* recovered against one renouncing to be heir, an adjudication may be raised against the superior for entering to the lands adjudged, and against the tenants for payment of the mails and duties, and both may be joined in one libel. The superior craving a year's duty for the entry, and the compriser refusing, the Judges would hear it *in praesentia*.

Act. Harper.

Alt. Herries, & Maxwell.

Eodem die.

IN a reduction of a valuation, the party lesed ought to call the whole heritors of the parish.

Act. Sinclair.

July 22. 1657.

JOHN TURNBULL *contra* HARY M'DOUGAL.

JOHN TURNBULL of Minto pursues Hary M'Dougal, as behaving him as heir to umquhile Sir William M'Dougal his father, for payment of the sum of 2000 merks addebted by his father Captain Hume, whereunto the pursuer was cautioner, and is now assignee: The pursuer condescends upon the behaving, by recovering decret against the Earl of Roxburgh for compt and reckoning of the sums due by his father, and declaring the lands of of M'Cerstoun redeemable. It was *answered* for the defender, That the allegiance above said ought to be repelled, in respect of the decret against the Earl of Roxburgh, which is only, *de presente*, a compt and reckoning, and declares the land only redeemable to the defender, being first heir, which is not done, but he is willing to renounce the benefit of his decret, which is much to the advantage of the creditor, and all other right he can succeed to by his father. The Commissioners found the exception relevant.

*Eodem die.*CLYTOUN *contra* DUNMOIR, *et e contra*.

THERE being a mutual action of molestation at the instance of Clytoun and Dunmoir, and upon both a commission to certain gentlemen to be sheriffs

sheriffs for cognoscing the marches by an inquest, conform to the act of parliament. In respect of the sheriffs relation to Clytoun, the said sheriffs delegate by their decreet, assoilzied Clytoun, and found Dunmoir to have done the wrong, and ordained him to restore the marches as before the wrong, and to desist in time coming. Dunmoir suspends, and raises reduction, upon this reason, That, by the articles of agreement subscribed by both parties, which are in the hands of the notary writer thereof, he is warranted to do the deeds controverted. It was *answered* for the charger, That the defence was competent before the Judges and sheriffs delegate. It was *answered* for Dunmoir, That it was not proper to propone the question before the Judges, the question being only sheriffs, instead of the ordinary sheriff; and, that it was not proponed before the sheriffs delegate, it was their fault, and they did wrong therein; because, by instruments produced, it is instructed, The suspender having obtained a charge of horning against the said writer, to produce the said agreement, and he being present at the time of the cognition, he both required him and the sheriffs delegate to cause him produce the same, which both they and the said writer refused; and because exceptions before inquest must be instantly verified, it was to no purpose to have proponed the same. The Commissioners sustained the reason.

Eodem die.

The Earls of *CASSILLS, LOTHIAN*, and others.

THE Earls of Cassills and Lothian and others, having granted a bond of 50,000 gilders and annualrents thereof to the factory in Campvere in *anno* 1650: There was a transaction thereafter for a lesser sum, and, in the the compt and reckoning betwixt the said parties, and others arresters, it was *alleged*, That the compt only ought to be conform to the latter agreement. It was *answered* for the factors, That no use could be made of the agreement, seeing it was not fulfilled, and especially seeing there was a clause contained in the agreement, That the first bond should stand ay and while security were granted by the debtors for payment to the factor betwixt and a certain time to their satisfaction; which security never being done, they can make no use of the agreement. To the which it was *answered*, That the agreement contained no clause irritant, in case of failure, to be void, but by the contrary a penalty in case of failure and annualrent. And the standing of the first bond was only to be for farther security to the factors, till they get the securities agreed. The Commissioners, notwithstanding of the answer, ordained the compt to be conform to the agreement.

Eodem die.

ANDREW REID contra THOMAS FLEMING.

IN a suspension, at the instance of Andrew Reid *contra* Thomas Fleming, mentioned 14th July, the suspender condescended, That the wine for which the ticket was granted was vitiate at the time of the delivery. It was *answered* for the charger, That the reason ought to be repelled; that the said suspender, or at least a cooper brought with him, in his presence, tasted the said wine, whereby the vitiosity could not be latent. It was *answered* for the suspender, That the answer ought to be repelled; because he offered them to prove, That the wine was impure by mixing it with milk and other scum, whereby

whereby the defect thereof was latent, and not discernible by the tasting. The Commissioners sustained the reason of suspension and duply, and repelled the reply.

July 23. 1657.

MARGARET AITKIN *contra* Laird of GRANGE.

MARGARET AITKIN pursuing a poinding of the ground, by virtue of an old infeftment in the year 1605. It was *alleged* by the Laird of Grange heritor, *Absolvitor*, because he was superior of the annualrent, and it being in non-entry, was in his own hands, and belonged to himself. It was *answered* for the pursuer, That the alledgeance ought to be repelled; because she had required Grange to infeft her upon precepts out of the chancery, and, he refusing to infeft, was infeft by the Commonwealth his superior. To the which it was *answered*, That the infeftment of the Commonwealth is only in supplement, and takes not away the casualty from the superior. The Commissioners repelled the alledgeance, in respect of the reply, and refused all entries by the Commonwealth.

July 24. 1657.

ANTONIA BROWN, with concurrence of her creditors, pursues a summons for interponing the Judges authority to the selling of her lands to her profit, calling on her nearest of kin on her father and mother's side; and they not compearing, the Commissioners advised the cause, and granted commission to the sheriff of Fife, where the lands lay, to take cognition and proof of the rental of the lands, the truth of the debts, the burdens and casualties of the lands, and the ordinary price of lands in the precincts wherein they lie.

Brown, Clerk.

Eodem die.

JOHN BOSSWELL *contra* Bailies of KINGHORN.

JOHN BOSSWELL pursues the Bailies of Kinghorn for unwarrantable imprisonment of him, and concludes, to set him at liberty, to pay his expence and damage, and interest, and to be punished in their persons and goods. It was *alleged* for the defenders, That this was a criminal cause, and behoved to be so pursued. The Commissioners sustained the libel for liberation, damage and interest, but referred the punishment to the criminal-court. It being farther *alleged*, *Absolvitor*, because the pursuer was justly incarcerate, by a decreet obtained before the Bailies of Kinghorn. It was *answered*, *Non relevat*, unless, upon the decreet, there had been a charge given, and the day prescribed, and an act of warding. It was *answered* for the defender, The defence was relevant, especially seeing he offered him to prove, That the officer of burgh required or charged to make payment, and that by an order from the Bailies virtually, and that after the charge ran, he was incarcerate, which was the custom of the burgh. The defence found relevant to be proven by the officer, executor of the warrant.

Dounie, Clerk.

Eodem

Eodem die.

Sir MUNG0 MURRAY *contra* GORDON of GLENBUCKIE.

SIR Mungo Murray, having charged Patrick Gordon of Glenbuckie, he suspended upon this reason, That the bond which is the ground of the charge, was extorted *via majore*; the charger having taken the suspender prisoner, being then in arms in opposite parties. It was *answered* for the charger, That he opposed his decret of suspension, wherein the suspender was compearing, and which time the said reason was competent and omitted. It was *answered* for the suspender, That competent and omitted was not relevant in suspensions, but only in ordinary actions, which had been an ancient and constant practice. It was *answered* for the charger, *first*, That the parity of reason was alike, otherwise that process should be infinite. *2do*, Oppones the act of Sederunt in anno 1649, against that former vitious decret, after this decret of suspension was discussed in 1650. The Commissioners referred the reason of extortion, as being competent and omitted, and found the letters orderly proceeded.

Downie, Clerk.

July 24. 1657.

SIMSON *contra* the Town of KINGHORN.

IN this cause, found, that an arrestment may be used on an heritable bond without a preceeding charge of horning, to make the sum moveable, just as heritable sums may be arrested conform to the act of parliament.

Aët. Cheap.

Alt. Norvell.

July 25. 1657.

CASKIBEN and others.

CASKIBEN Laird of Innes, John Forbes of Asloun, Mr Robert Burnet, and Alexander Forbes, being in a multiple-poinning. It was disputed in the inner-house *ad nauseam*. The case I must enquire after.

Aët. Gilmor, Wedderburn, Herriot, & Burnet.

Eodem die.

MARGARET AITKIN *contra* KIRKCALDY of GRANGE.

MARGARET AITKEN pursues a poinning of the ground of the lands and Barony of Grange, whereunto she is infest as heir to her predecessor, *contra* Kirkcaldy of Grange, now heritor thereof. It was *alleged* for Grange, *Absolutor* from the annualrent preceeding the prior infestment, or requisition made to him to infest her; because the decret was then in non-entry, and so was in his own hands as superior thereof, in respect the same was holden of the former Laird of Grange, granter thereof. It is *answered* for the pursuer, That the annualrent being only a surety to her, if the bond does not fall in non-entry. It was *answered* for the defender, That the reply is not relevant, unless it were *alleged*, That the defender was a debtor, and bound personally to pay the annualrent; in which case, personal obligation would hinder him to make use of the non-entry; but this defender being only superior of the annualrent, but not representing the debtor, who was bound to pay the same, he might have the common benefit of the law, and right of his superiority. The Commissioners

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sustained the defence with ——— of the reply, and affoizied from annualrents preceeding the requisition. *Vid. July 23.*

Downie, Clerk.

Eodem die.

CLOVERHILL contra THOMAS NIVEN.

CLOVERHILL, having pursued Thomas Niven as principal, and Thomas Niven younger his son, as cautioner, to make payment to him of 2000 merks, due by their bond to umquhile Robert Schaw of Kelsoland, whereunto he had right by translation. They suspended, alledging compensation by a bond granted by the said Thomas of Monkerden, to the said Thomas Nivan younger, of a greater sum. It was *answered* for the charger, No compensation on that bond; because there was a provision therein, That Kelsoland, during his lifetime, might satisfy the same by payment of six shillings eight pence. *2do*, The bond being granted gratis, could not compensate the bond charged upon, being real sums of money. *3tio*, Unless it were *alledged*, That the time of payment was come before intimation, it could be no ground to compensate. It was *answered* for the suspender, That the said condition contained in the bond was only personal to Kelsoland during his own life, secluding all others, and he being then dead, the suspender could have no benefit thereby. *2do*, There is no such exception from compensation upon the difference of the cause of the bond. *3tio*, He offered him to prove, That the time of payment came before intimation. The Commissioners sustained the reason of compensation so propounded, and the charger having thereafter declared, That he would pass from young Minkerden the cautioner *pro loco et tempore*; and so the process ceased, and craved sentence against the principal debtor. The Commissioners would not suffer him to pass *pro loco et tempore*, but either to accept of compensation from him, or simply to pass from him as cautioner, which the charger did, and so the reason of compensation was repelled.

Downie, Clerk.

Eodem die.

Captain BRYCE contra GEORGE BILTON.

CAPTAIN BRYCE having charged George Bilton, upon a decret re-covered before the bailies of Edinburgh: He suspended, *alledging*, That it must be presumed, That Bryce must pass from the particulars of accompt contained in the decret; because Bryce becoming insolvent, Bilton had accepted from him the lands of Kinnuel for L. 13,000 Sterling and more, for which he gave only half as much, which not being a competent price, and surperplus above the price, was, in effect, quit and gifted, and so it must be presumed that it was in satisfaction of these particulars due to Bryce. *2do*, Nevertheless, if need be, in fortification of that presumption, he offered him to prove by witnesses above all exception, that Bryce promised, the time of the bargain of Kinneul, to grant a general discharge to Bilton, which was competent probation in England, the parties being both Englishmen, and knowing no other law, behoved to be received here. It was *answered* for the charger, *1mo*, That to both he opposed his decret *in foro contradictorio*, and Bilton compearing and denying the libel, which was sufficiently proven by witnesses; so that this reason being then competent and omitted, and no compensation receiveable, after a decret, by act of parliament,

ment, can be sustained. *2do*, Though it can be sustained, it cannot be proven by such a conjectural presumption, or by witnesses, against a known law of this nation; and though both parties be English, yet being residents and heritors in Scotland, they are obliged to know; and the ignorance of the law of Scotland cannot excuse them, neither are they to be regulated by the law of England. The Commissioners found the reason only relevant *scripto vel juramento*.

Downie, Clerk.

Eodem die.

MATTHEW ALLAN *contra* the Magistrates of ROTHSEY.

MATTHEW ALLAN pursues the magistrates of Rothsey, for payment of 1000 merks due to him by Ninian Stewart, whom he had incarcerated in the tolbooth of Rothsey, and who had escaped forth thereof. It was *answered* for the magistrates, *Absolutor*, because they offered them to prove, that their toolboth was sufficient, and that the prisoner escaped by breaking off the lock, and they were not obliged to keep a guard; and so having done their duty, they cannot be liable. It was *answered* for the pursuer, That he took instruments of the acknowledgment of the incarceration, which proves his libel, and *alledged*, the reason was noways relevant, because the tolbooth ought to have a cross-band of iron without the door, and locks thereupon, which the prisoner could not have reached; so that by the defence, it is clear, That the tolbooth, having only a lock within, was not sufficient. The Commissioners repelled the defence, for the libel was proven by their acknowledgment, and decerned; but the defenders passing from the defence as not proponed, they suffered him so to do, and assigned a time to the said pursuer to prove.

July 26. 1657.

— *contra* the Town of DUMBARTON.

I N a subsidiary action pursued by — against the magistrates of Dumbarton. *Alledged*, The rebel escaped by no fault of them, but that he brake the prison-house and fled. *Answered*, The prison-door not having two locks and a cat-band, and their not appointing a keeper for the rebel, makes the magistrates liable. This they sustained to make them liable.

A^d. Fleming.

Alt. Gilmer.

July 27. 1657.

HALLS *contra* the Master of GRAY.

HALLS, as executor to umquhile Andrew Halls merchant at London, pursues a reduction of a decret of *absolutor*, pronounced by the Judge in anno 1652, whereby the Master of Gray, as heir to his father, was assoilzied from the annualrent of part of the sum of 1400 merks Sterling due by bond to the said umquhile Andrew, and from a part of the principal sum. The reasons were, That the decret was null, as being 10th August, which, by act of parliament, was vacant-time. *2do*, It was null, as wanting lawful probation, in respect it being *alledged*, That there being a former process before the Lords of Session in 1636, wherein umquhile Sir William Gray, being pursued by the said umquhile Andrew Hall for payment of this sum. *Alledged*, *Absolutor*, for several parts of the principal sum which he had paid; and
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for the annualrent of the rest; because he had made offer of the said sum by one Smith factor for Patrick Wood at London, and that the same was refused by Hall: whereupon the Lords examined witnesses, and took the said Sir William his oath; and, thereupon, by two several interlocutors, assailed from the annualrents: For the instructing whereof, there was nothing produced before the Judges but unsubscribed copies of the minutes of process before the Lords, which could never have improved; neither the oath of Sir William hath liberated himself, tho' the principal had been produced. *3tio*, Before the Judges decreet, Sir William Gray having pursued Halls and Forth his copartner, and now pursueth before the Chancery, they, upon oath, deny the offer; and they having pursued the factor, *alleged*, He offered to pay the money consigned, he, by his oath, declared there was none consigned; and therefore assailed. It was *answered* for the defender, That he opposed the decreet *in foro contradictorio*, expressly finding and declaring, that the probation adduced was sufficient; and therefore to quarrel the same, as not being proven, is a reason of iniquity which is never sustained. And as for the process before the Chancery, it was competent and omitted, and the pursuer thereof could not be ignorant of it, having deposed himself. And for the *absolutor* against the factor, he opposed the same, bearing the factor to have deposed, that he made real offer of the money by command of his master Patrick Wood, to be with him bags of money, and offered to pay the remainder of the debt due to Sir William Gray upon Mr Hall's discharge, and Mr Hall refused the same; and as to the probation, it is known, That my Lord Craighall who was present at the pronouncing of the decreet, was also then one of the former Lords of Session, and knew the matter so done, and as is contained in the minutes. The Commissioners found the answer sufficient to evict the reasons of reduction, and assailed therefrom.

July 28. 1657.

Mr JOHN HALYBURTON *contra* Lord COUPAR.

MR JOHN HALYBURTON minister of Dunfermline, having charged the Lord Coupar to remove from a house within the Abbey of Dunfermline and lands designed to him for his manse and glebe: He suspended, and *alleged*, That his designation was null, being after the act of parliament 1649, for manses and glebes, wherein the form of designations is prescribed to be by the ministers and elders, and his designation is subscribed by ministers. The Commissioners found the designation null without reduction, and therefore suspended the letters *simpliciter*.

Eodem die.

MARION SYDSERF *contra* PAUL POWET.

LAURENCE MERCER suspending in a double poinding, Marion Sydsenf assignee, and Paul Powet arrester of the said sum, and they competing, both the intimation and the arrestment being upon the same day. It was *alleged* for the assignee, That she ought to be preferred, seeing her intimation made her right compleat, and the arrestment was but an imperfect right until sentence. *2do*, The intimation was prior, the instrument bearing it to be done at two of the clock, and the arrestment having no hour mentioned, could neither be reputed, or be at or before two of the clock. It

It was *answered* for the arrester, That he having done legal dilligence equally in time, ought at least to come in with the assignee, it being more equitable, that both creditors should share, than that one should exclude the other; and as for the hour, it was not to be respected, nor was it certain, but the arrestment might have been prior. The Commissioners preferred the assignee.

July 30. 1657.

HALYBURTON contra Lord COUPAR.

IN the pursuit, Mr George Halyburton against my Lord Coupar, it was found, That the expence of building the manse must be divided proportionally amongst the whole heritors, conform to the act of parliament made 1649, notwithstanding that my Lord being a Lord of erection had kirklands lying nearest to the kirk.

Act. Wedderburn.

Alt. Oliphant.

July 31. 1657.

JEAN CARMICHAEL contra THOMAS LOCKHART.

JEAN CARMICHAEL charges Thomas Lockhart, as heir to his father, for implement of a contract of marriage, upon a decret obtained against him long before, as lawfully charged to enter heir to his father. He suspended, and *alledged*, That he was then, and is yet a minor, and offered to renounce. It was *answered* for the charger, That a renunciation could only free an heir *re integra*, where both parties might be put in the same condition they were in the time of the decret, which could not be here; because the suspender's father's estate was burdened by an apprising for the suspender's own debt; and so, by his renunciation, the charge will be postponed and prejudged; and, by that preparative, minors prefer their own debtors to the debtors of their predecessors. It was *answered* for the suspender, That it was the charger's fault they did not present their diligence. The Commissioners repelled the defence, in respect of the reply, ay and while his own debt were purged.

November 1. 1657.

MUIRHEAD contra PURVEYANCE.

MR JAMES MUIRHEAD having entrusted L. 4000 to one Purveyance, a merchant in Glasgow, to be sent to his son then in France, he gave a letter upon the receipt of the money to Mr James, but did not deliver the same; and being conveyed for restitution, he *alleges*, That he had given that money to Adam Mason in Rochell, to be given to Mr John Muirhead, and being neither factor nor commissioner, nor having any good deed for his pains, he had done with that money, as he had done with his own. This was repelled, and the libel admitted to be proven. There was just the like pursuit moved by an Aberdeen's man against another, with this difference, that the person to whom the money was entrusted, to be sent to Campvere, had not given any receipt upon the delivery thereof; but the receipt of the money being referred to his oath, he depones, *qualificatè*, it is true he received it, but that it was also taken from him by the Dun-

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kirkers in his passage; which quality, the Judges sustained to assilzie without any probation.

A.R. *Alexander.*

Alt. *Gilmor.*

November 2. 1657.

The Laird of *SMEITON HEPBURN contra OLDAIRNY.*

SMEITON HEPBURN being charged for payment of 1000 merks due by bond by him as principal, and Mr Paul Mowat as cautioner to Oldairny, suspends on this reason, That the charge is to the behoof of Mowat the cautioner, which Mowat accepted from the suspender an assignation to a decreet, in satisfaction of the said sum of 1000 merks, for which he was cautioner for him. It was *alleged* for the charger, That the assignation produced proves not the reason, because it bears not, in satisfaction, but only for relieving and freeing of the cautioner; and did not contain a condition, that the cautioner should pay the sum, and retire the bond for the principal's relief. *2do*, It is clear by the assignation, that the decreet assigned for relief was not in the cedent's hand, but he is obliged to extract and deliver it. It was *answered* for the suspender, That the assignation, albeit in the narrative it bore for relief, yet in the disposition it is simple, which must be interpreted in satisfaction, because there is no provision therein: That the cautioner being otherwise relieved, the assignee shall repon the principal debtor; which would necessarily have been, if it had been only for corroboration of the clause of relief. *3tio*, And that it contains absolute warrantice, which had been unnecessary in a corroboration. The Commissioners found the assignation not to be in satisfaction, but only in security, and that it proved not the reason; and therefore found the letters orderly proceeded.

Brown, Clerk.

November 17. 1657.

JAMES RAE contra RIDDOCHS.

JAMES RAE, as executor constitute by Beatrix Hodge to a bond granted to her by John and Alexander Riddochs, for payment to her of L. 80 yearly for her aliment, charges thereupon; Riddochs suspend. *Alleged*, Compensation by a bond of L. 50, granted by the cedent Beatrix Hodge, and her husband Patrick Veitch to them. It was *answered*, That the said bond was null, and not obligatory as to the said Beatrix, cedent; because she was then *vestito viro*, which also was sustained: And it was farther *alleged*, That compensation ought to be admitted upon the said bond, as being granted by umquhile Veitch the husband, who, as husband, had right *jure mariti* to this annualrent. It was *answered*, It being alimentary was not liable to the husband's debt, nor could not have been arrested therefor. It was *answered* for the suspender, That the constitution of this annualrent was originally free, as being a free donation in alimentation; but though it named aliment, yet it expresses the cause thereof to have been an anterior onerous cause. This cannot be decided, because there were discharges of this annualrent produced during all the time of Veitch the husband's life. But it was thought that it was not so alimentary as to exclude the husband's right, he having provided his wife. *3tio*, Compensation was *alleged* upon the same bond against this charger, because his cedent Beatrix Hodge was, before the assignation, debtor in the said sum, of L. 50, tho' not *proprio nomine*, yet, as executor to umquhile Veitch her husband,
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granter thereof. It was *answered* for the charger, That compensation is only competent when the grounds of compensation are only liquid; but this bond is not liquid, in so far as there is no decreet against the cedent, who was executrix, constituting his debtor; and therefore, it ought to have been pursued against her by action, wherein she would have alledged the inventory was exhausted, which was not proper here by way of reply, nor would not exoner her at the hands of the defunct's creditors. The Commissioners repelled the reason of compensation, severals being of contrary opinion, that compensation was competent, and that the executor, as well as heir, may, in an action, alledge exhausting, without the trouble of a new process or pursuit.

Balfour, Clerk.

November 18. 1657.

JOHN BROWN in GORGIEMILL contra THOMAS BROWN.

THOMAS being pursued upon a ticket granted by him to umquhile John Brown his master, and now assigned to this John Brown his son, bearing Thomas, designed in the ticket clerk of John's brewery, to be addebted to the said John of 1300 pound Scots, after compt and reckoning, for ale received, and given forth by the said Thomas. It was *alledged* for the defender, That he ought not to make payment of that sum; because by the ticket it is evident, that it is upon an accompt betwixt him as clerk to the brewery, and his master, and that of ale received by the defender out of the brewery, and given out to vintners, bears not the price was received in by the defender, nor contains not an obligation to him to pay it; and so is only the rest of a fitted accompt, which cannot oblige him to payment, but to do that diligence, he was obliged as clerk to the brewery; and therefore he is content to compt for that sum, the pursuer allowing what ale he gave out at that time to his master's customers, to whom he was used to give ale upon trust, and against whom he did recover decreets in his master's lifetime, in his master's name, and had no interest thereby to put them in further execution. It was *answered* for the pursuer, That he opposed the ticket, which albeit it bore not an obligation to pay, yet acknowledges the sum to be owing; for that it may be presumed, the servant hath taken the hazard of the customers in his own hand. *2do*, That this ticket cannot be taken away by witnesses proving the outgiving of ale to customers. The Commissioners found the defence relevant, as it is proponed, and ordained compt and reckoning, considering that there did nothing expressly appear of the taking of the hazard upon the defender who was a servant; and that the probation thereof was mainly by ——— decreet, and witnesses were only to prove, that these persons were formerly customers to John Brown upon trust.

Balfour, Clerk.

Eodem die.

WILLIAM HAMILTON contra SAMUEL BIRSE.

SAMUEL BIRSE, by his bond, granted him to be addebted to Sir Francis Hamilton, in the sum of L. 16 sterling, wherein he is obliged to pay L. 4 sterling to Sir Francis Hamilton, and L. 12 to Thomas Hamilton, in satisfaction of annualrent due by Sir Francis to Thomas. This being assigned both by Sir Francis and Thomas to William Hamilton, he charges Samuel Birse, who suspended upon this reason, That before the assignation,

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at least before the intimation, he had transacted with Sir Francis, and given him satisfaction and new security; whereupon he wrote to William, as having the bond in his hand, conform to his letter produced, which is equivalent to a discharge. It was *answered* for the assignee, charger, That he having assignation from Thomas Hamilton to L. 12 sterling of the bond, nothing done by Sir Francis could farther discharge than for Sir Francis's part, *viz.* L. 4 sterling. The Commissioners found the reason relevant only for the L. 4 Sterling, considering, that though the ticket was granted to Sir Francis, yet being in favours, and to pay to Thomas, who had accepted that constitution, by his assignation thereof, the which assignation is anterior to the alledged transaction and missive, Sir Francis could neither give up nor discharge the bond, in prejudice of Thomas, after the acceptance in his process of a ticket of L. 4 sterling, having but one witness, as being by collation of the subscription and body.

Balfour, Clerk.

November 21. 1657.

The Lady *KILBUCHO* and her BAIRNS *contra* the Laird of *KILBUCHO*.

BY contract of marriage betwixt Mr Alexander Dickson, and Sandilands his spouse, she is provided to the conquest of all lands during the marriage, and the bairns of the marriage are provided to the said conquest in fee, and Kilbucho obliged to take all lands so conquest to him, and his spouse, and failing of them by decease, to the bairns of the marriage; whereupon, after Kilbucho's death, his relict and children pursues his heirs to fulfill these articles of the contract of marriage, and to infest her in liferent, and her two bairns in fee, in the lands of Windyhill, conquest during the marriage. It was *alledged* for the defender, as to the relict, That to infest her in the lands conquest, can only be understood in the lands conquest free of debt, as in the case in Dury betwixt the Laird and Lady Renton, *anno* 1634, the conquest was found to be burdened with a sum due as a part of the price thereof. It was *answered* for the pursuer, That she opposes the contract, bearing all lands conquest without restriction; and as for the practise there, the bond bears expressly, that it was a part of the price of the land whereupon it was allowed as a burden, but any debts here bears no such thing, and likewise conquest was in this case interrupted of debt, in two cases of Dury, Earl of Dunfermline *contra* the Lady Dunse, and Barton *contra* Hardone. The Commissioners repelled the defence, and decerned as to the bairns. It was *alledged* for the defender, That the two bairns pursuers could not have the whole right of the conquest-lands, but only two thirds, seeing there was also a bairn, and ought to have his third. It was *answered* for the pursuers, That bairns are ordinarily understood in-law, the other bairns beside the heir, as in a bairn's part thereof the heir will have no share, and that it was here the meaning of the contracters, there being a special provision in the contract of lands, in favours of the heirs-male of the marriage, and that to a considerable fortune. It was *answered* for the defender, That albeit in moveables bairns were interpret as a term of law, and exclude the heir, yet the question here was of heritage and succession. The Commissioners found the defence for the third part relevant, and assoilzied therefrom, and decerned for the rest, considering that by the clause the husband was obliged to take infestment of the lands conquest to himself, his wife, and the bairns of the marriage, which, if it had

had been so taken, it was no doubt but that one inquest would have served the bairns, as heirs of provision, without excluding the heir; so they would have all been infest, and all have right.

Brown, Clerk.

November 21. 1657.

R E I D contra ———.

IN an action of abstracted multures, being pursued by William Reid as infest in *molendino cum astrictis multuris omnium granorum crescentium*. *Alledged*, They behoved to deduce the seed, horse-corn, and teind, which of their own nature are multure-free. *Answered*, The teind could not be deduced, because his infestment in the mill, *cum astrictis, &c.* flowed from him, who had right both to stock and teind, and heritor thereof; and therefore the teind could not be free. *Alledged*, That unless he say, he has also right to both, he cannot convene them for abstracted multures of the teind. *Alledged* for the pursuer, They intromitted with the teind, and so must be liable. *Answered*, *Non relevat*, unless it be *alledged*, That the defender had right from him, who was heritor both of stock and teind. Then it came to be disputed, Whether he had right or not; whoever was heritor of the teind, behoved to be liable for abstracted multures, the pursuer being infest *cum multuris omnium granorum &c.* It was contended, That teinds, *sua natura*, are multure-free, unless there were an express thirlage of the teind by him who had right; because the case was put, as if the Abbot of Melrofs had sold thir lands with all right whatsoever he could pretend thereto, were it not absurd to say, that the right of the teinds were also included in the disposition. Even so, albeit the Abbot, author to both their parties, had sold the mill, *cum multuris omnium, &c.* unless he had expressly thirled both stock and teind, the teind is interpreted to be free, notwithstanding of that generality *omnium granorum crescentium*. This was desired to be heard *in presentia*. The Commissioners, after dispute, found the teinds thirlable by him who is heritor both of stock and teind.

Eodem die.

WARRANDER contra STRATON.

A Declarator of bastardy pursued by one Warrander; compears Straton who had the first gift and declarator, intented, marked and seen; and *alleges* Warrander cannot have his gift declared, because he was preferable to him. *Answered*, The Pursuer's gift, though posterior, was preferable; because a gift was of the nature of an assignation, *et sunt pares termini in jure*, and in law the posterior assignation, with the first intimation, is preferred to an assignation prior in date not intimate. But so it is, the pursuer has intimate his gift first, by the convening of the debtors of the bastard to pay to him, which the defender has not done. *Replied*, A naked gift without a declarator, is not of the nature of an assignation; and therefore the Judges assigned the defender a day to prove.

Ast. Nisbet.

Alt. Gilmer.

X

November

November 24. 1657.

S A N D I L A N D S *contra* K I L B U C H O.

SANDILANDS and her two bairns pursuing her own Son, as heir to Mr John Dickson of Kilbucho her husband, to infest her in the lands conquest, the time of the marriage provided by her contract of marriage to her in liferent, and to infest her other two bairns in fee, conform to the said contract. *Alledged* for the heir, That she could not have the conquest, but with the burden of the debt contracted by Mr John himself, neither had he any conquest, because in law, and in the opinion of Craig, that is called *acquisitum*, not only whatsoever belongs to himself otherways than as heir, but what is acquired by his own proper means and industry, deducing his debt; but the relict's husband acquired nothing that way, but they were acquired with the burden of much debt, more than all the conquest was worth, especially seeing this provision of conquest is a donation by Mr John to the pursuer. The Judges decerned the heir to infest her in the conquest-lands libelled, though with debt, and found her free of the debt contracted to that end, reserving the infestments upon the conquest as accords. And the creditor who was infest compearing, it was declared, it should be without his prejudice. Then the heir *alledged*, The other bairns could not have the full conquest, because, by the contract, it is provided to the bairns of the marriage, *ita est*, the heir is a bairn, and therefore must have a share. *Replied*, Though the heir was naturally a bairn, yet in a civil acceptation he is not a bairn, but is presumed to have a sufficient portion of his own, without having any part of the legitime; for a natural portion is due of the law to a bairn, *qua* bairn, and if the heir will have a part of the bairn's portion, he must confer his heirship with their portions, which the pursuers were content of. *Answered*, Though it was so *in mobilibus*, yet it was not so *in immobilibus*. And therefore the Lords found the heir without collation, ought to have the third of the conquest as a bairn, and the other two parts to belong to the other two bairns. *Alledged*, The relict promised to entertain the children freely, for the space of six years, if she got the conquest. This was reserved to them to pursue therefor, and that it ought not to sist this action.

Act. *Nisbet.*Alt. *Wedderburn.*

November 25. 1657.

E L I S A B E T H H A M I L T O N *contra* the T E N A N T S of C A R B E R R Y.

I N this process, the alledgeance proponed and delivered, *viz.* That the defenders could not remove, because they were tenants, by payment of mails and duties to the apprisers of all right competent to Mr Andrew Hamilton of the lands libelled, who, *jure mariti*, as husband to this pursuer, had right thereto; which apprisers were publickly infest, before the warning, and are not called, for which a short day was granted, in respect that, by the public infestment, the apprisers had such right, as the pursuer might, and was obliged to know, not being a base infestment.

November 26. 1657.

The Lady R E N T O N *contra* the Earl of L E V E N.

T H E Earl, being charged upon a bond of 5000 merks of borrowed money granted to the Lady, suspends, and raiseth reduction upon this reason

reason, That he offered to prove by the Lady's oath, that the bond was made to the behoof and use of her son the Laird of Lamerton, against whom he ought to have compensation, with several bonds granted by Lamerton to the Earl or his Lady, to the which he hath right *jure mariti*, for which he hath raised exhibition against Alexander Kennedy haver thereof, who hath produced them and bides by them, together with a back-bond by umquhile Lamerton, declaring that the sums due to him by the Earl of Leven, was to the use of the Lady Leven and her children. It was *answered* for the charger, Though this bond was to her son's behoof, yet no compensation upon the said bond now exhibite; because, before this charge, they were litigious, by an improbation raised against them, and the said back-bond, upon pregnant reasons and evidences of forgery; and offered caution to make the same forthcoming, in case the Earl prevailed. The Commissioners found the letters orderly proceeded, superseding extract till the second February, and, in the mean time, the Lady may go on in her improbation, and the Earl in his reduction.

Eodem die.

JOHN M'GILL *contra* MARGARET THOMSON.

JOHN M'GILL pursues the said Margaret to remove from a part of a tenement in Edinburgh. It was *alleged* for the defender, That she is heir or apparent heir to — Thomson her father, who is inest in the third part of the tenement of Janet Nicolson one of the three sisters; and, by virtue thereof, hath been in possession ten or fifteen years bygone. It was *answered* for the pursuer, That the alledgeance ought to be repelled, because, by decret-arbitral produced, betwixt the said three Nicollsons heirs-portioners, that this part of the tenement in question fell not to the defender's author, but to the pursuer, who is therein inest *per expressum*, and the defender only generally in a third part. It was *duplied* for the defender, That the said contract of division was but personal, and no inestment, by resignation, had followed thereon; and so cannot prejudice a singular successor. It is *triplied* for the pursuer, That the said division is interrupted by a decret decerning the defender's author to desist from hanging her iron and others at this window to trouble the light thereof, which was then a cellar. The Commissioners found the defence relevant *in hoc judicio possessorio*, and repelled the reply and triply, referring the same unto reduction.

Eodem die.

The Laird of TILLYBOLL *contra* COWIE.

TILLYBOLL having raised an advocacy of an action at my Lord Cowie's instance against him before the Sheriff of Fife, because the question was about teinds, and because there remained a question of nullity, whether the tack of teinds, which was the pursuer's title, set with consent of the Chapter, was null or not; and offered to prove by Cowie's oath, that he was within the degrees of consanguinity to the Sheriff. The Commissioners, considering the last reason was relevant, and would make delay for probation, Cowie not being in town, did, in consideration of the first reason, advocate and ordain the parties to dispute in the principal cause.

Eodem

Eodem die.

Sir JOHN JESIRE of LAY *contra* CHRISTIAN SINCLAIR.

SIR John Jesire of Lay, pursuing Christian Sinclair for — it was found, That Mr Robert Sinclair might be admitted to be witness, though he was her tutor, and had been her advocate, seeing the matter was of his proper knowledge, and no secret in the cause.

November 26. 1657.

KIRKTONS *contra* ANDREW RUTHERFOORD the TUTOR and his CAUTIONER.

KIRKTONS pursuing their tutor for an accompt, and in that same libel, his cautioner. It was *alledged* for the cautioner, That it was only competent against him as *subsidiaria actione*, after the tutor was discussed. It was *answered* for the Pursuer, That they craved only sentence against him to take effect after the tutor was discussed by horning, or otherways the decret against him could not be extracted till the discussing. The Commissioners found the defence relevant, notwithstanding of the reply, and therefore found no process against the cautioner till it were discussed.

Eodem die.

WILLIAM BORTHWICK of CRIKSTON *contra* PATRICK VAUGHTON of CRAIGNAMURE.

THERE was an old reversion of the lands of Cowberryhill granted by Craignamure's predecessors to Crikston's predecessors, declaring the same to be redeemable upon so many species of gold, extending to 3000 merks, and obliging Craignamure, in case of redemption, upon payment or consignation of the said sum, and a tack for five years at 12 merks yearly, to renounce the said lands, with all right and possession he had or should acquire thereof; whereupon this Crikston, as heir general, served and retoured to his predecessors, pursued this Craignamure as heir or apparent heir to his father, in a declarator of redemption of the said lands of Cowberryhill, upon an order used many years ago, wherein it was found, That, albeit the order was used upon Sunday, and that Crikston himself could shew no infestment or any other right, but this reversion, and albeit the solemnities of citing all parties at the cross having interest, was admitted in the summons, and albeit the consignation was only of 3000 merks of present current money, and neither in the species mentioned in the reversion, nor at the value they were worth the time of the reversion, in respect that the weight and value of the species expressed was not particularly mentioned; and that some of the same was mentioned, not in the species, but in current money; yet the order was sustained, and declared, and Craignamure decerned to grant renunciation; yet with this restriction, That he renounced all right and possession that he or his predecessors had from Crikston's predecessors, and these words, *all right and possession that he then had or should have*, were only interpreted of such right and possession as flowed from Crikston. After this declarator Crikston pursues Craignamure, and warns him upon a removing. It was *alledged* for the defender, *Absolutor*, because the pursuer had no infestment

feftment nor real right, without which there could be no removing; *nam nulla fafina nulla terra*. It was *answered* for the purfuer, That he needed no feifin againft the defender, who had renounced to him all right and poffeffion of thir lands, flowing from him or his predeceffors; and though regularly there could be no removing without an infeftment as by a real right, yet there might be by obligement, declaration or perfonal right; as if any perfon having put another in poffeffion, and having granted a tack, and after expiring thereof purfued him to remove, he could never object to his mafter the want of a feifin, feeing *caufam habuit poffeffionis ab eo*; and fo here, the defender, by virtue of his renunciation, to acquire to the purfuer the poffeffion that he had renounced, efpecially feeing he had not clothed himfelf with any other right or poffeffion; and feeing the purfuer had ufed all poffible diligence, by charges, to get himfelf infeft againft the defender and others. The Commiffioners repelled the exception, in refpect of the reply, and decerned.

Douny, Clerk.

Eodem die.

K I R K T O N S *contra* H U N T H I L L.

IN the caufe of the three fifters, Kirktons *contra* Hunthill their tutor, for his tutor's compt; it was *alleged* for the defender, No procefs becaufe all parties having intereft were not cited *viz.* the reft of their tutors and their fucceffors; for albeit tutors *ex officio* be all obliged *in folidum* for what is due by any of them to their pupil; yet in reafon they ought to be called, that they might concur in making of their accompts; feeing there were in the difcharge given out by them feverally, and to the effect, that all compting being decerned *in folidum*, whofoever fhould be diftressed, for they might have ready relief againft the reft, without a new compt, as it is in the cafe of executors, factors, and curators; and was found the laft feflion betwixt Livingston *contra* Livingston. It was *answered* for the purfuer, That feeing all and every tutor was obliged for the whole, as co-principal or cautioner, any one of them might be purfued to compt for the whole, and pay the whole; and that the purfuer, being poor, he was not able to be at the expence to raife a new procefs. The Commiffioners found, That though regularly all fhould have been called, yet they fufained the procefs conditionally, the purfuer calling the reft and infifting againft them, before the compt clofe, that the compt may clofe againft them all.

Brown, Clerk.

Eodem die.

J O H N R E I D of B A L L D I L L I N G, and J O H N R E I D of
B A L L O C H *contra* J O H N M I T C H E L L of D A L Y E A N, and
other Feuars of M A C H L E N.

TH E purfuer being infeft in two equal halves of the Pubrie of Katrine by the Abbot of Melrofe and Lords of Cowdairne their fucceffors, containing exprefly the lands, thirlage, and the thirteen curn of *omnium granorum crescentium super sole dictarum terrarum per prius astrict*. It was *alleged* for the defender, That teinds *de sua natura* were not thirlable; becaufe, according to the common law in vigour, the time of constituting thefe rights, and by which they were regulate, the Abbot was not proprietor, but ufufuctuar and adminiftrator of kirk-patrimony, the property thereof was God's; therefore he could not fell nor delapidate the fame, and fo no

constitute thirlage thereupon, which is most odious, especially upon the teinds, which are accounted the spirituality, and to belong to the church, *jure divino*; and after the Lataren council could not be alienate; albeit the teinds were thirleable, yet they cannot be reputed thirled, unless they were expressly thirled; for the disposition or right of lands comprehends not the teinds unless expressed, being *separatim jus*; for neither do the thirlage of lands comprehend the thirlage of teinds, unless expressed. 3^{tio}. In this cause the pursuer's infeftment being of the multure of the grain upon the lands formerly astricted, that was understood acceptance; and unless it was shewn, that the teind was formerly astricted, they were now, *de novo*, astricted by the pursuer's infeftment, whereby they had only the multure of the grain formerly astricted; and not only the pursuer could not prove the teinds were formerly astricted, but the defender offered him to prove, that thir original feus granted by the Abbot was anterior to the pursuer's original infeftment; and that, in the defender's infeftment, they were expressly thirled to come to the mill of Machlen with their own grain, and pay their corn of multure, which one grain did not comprehend the teind, seeing they belong to the Abbot who drew them, and were his own, and free. It was answered for the pursuers, to the first, That the common law must be considered as it was allowed and restrained in Scotland by custom and statute, whereby it was unquestionable, that beneficed persons might and did give dispositions and infeftments of kirk-lands, not only feu, but also blanch and ward; as were several of the bishoprick of St Andrews, never questioned; and that simply by the common law of the kirk-patrimony, might be set in feu without diminution of the rental, and affected with servitude that was unquestionable, especially with a thirlage, which is an onerous and necessary cause, viz. The grinding of the corns; and here the Abbot did not thirl but his own land and teinds, having right of both to his own mill; and he might have granted feus, *cum decimis inclusis*, of these lands stock and teind; so much more might he do the same to his own mill, and grant a feu of the bond to one, and the feu of the mill, both of the stock and teind, to another. To the second, Albeit the right of the stock carries not the teind; because they are commonly in the hands of divers persons, and conceived ordinarily by divers kinds of rights, yet it will not follow, that the thirlage of the lands and teinds must be by several express rights: And, seeing here the thing expressly given, is not multure of lands, but the multure of grains growing upon the lands, that must necessarily comprehend both stock and teind; seeing both grow on the land; as a disposition of the crop of lands would undoubtedly comprehend both stock and teind. To the third, As to the tenor of the pursuers infeftment, thirling the grains growing on these lands formerly astricted, (these words *formerly astricted*), are not taxative but demonstrative, acknowledging that they were formerly astricted, and would constitute the thirlage, though there had been none before; and seeing the Abbot had thirled the vassals corns by their own infeftment, and by the pursuers infeftment, had thirled all the grains growing upon thir lands, if the teinds remained free with the Abbot, when he granted the defenders feus, yet, by the pursuers feu he thirled them, seeing he did not except them. The Commissioners found these words in the pursuers charter (*p. prior astrict.*) to be taxative, in respect of the defenders infeftment, whereby their own grain was only astricted of before, and not the Abbot's teind; and therefore found the defence relevant, and assigned a time to prove by the defenders infeftment, anterior to the pursuer, that their own grain was astricted allenarly, and repelled the first and second alledgeance, and found the teinds thirlable.

Balfour, Clerk.

November

November 28. 1657.

K I R K U R D contra L A W.

A Declarator of property being pursued by the Laird of Kirkurd against Law, of the muir of Kirkurd, and to hear and see him decerned to desist from pasturing in the said muir, except of fifteen sounes gras, and to have a common hird with his, and from casting of seal and divet. *Alledged*, He could not desist —, because he is infest *cum petariis et turbariis*. 2do, *De jure*, he that has the right of pasturage, has the right of casting feuel, &c. *quia jus pascendi est major servitus et includet minores*; and so he might cast what he pleased. 3tio, He was not obliged to have a common herd with him, because he being infest in his lands, *cum libertate pascendi in communia de Kirkurd*, he might lead his sheep where he pleased. *Answered*, 1mo, He was infest in his own lands *cum petariis*, &c. but not in the community of Kirkurd, *cum libertate effodiendi*, &c. only in so far as he has *jus pascendi* which, in law, includes casting of seal as a *minor servitus*; and therefore, the defender must tax his casting according to his 15 sounes gras, which will be the 20th part of the muir; because he is not principally infest in casting, but consequentially by his right of pasturing; and so the one must be proportioned to the other. Likeas there is a necessity of a common herd in a muir, because his sheep being led on such a room, the other may enter there and pasture, and possibly the one may hinder the other, and so fall in blood, and the ordinary custom for eviting such inconveniencies is to have a common herd, and to pasture promiscuously. On the other hand, it was contended, That the law knew no such distinction as principal and consequential servitudes; but he having liberty to pasture on any part of the muir, he might also cast seal on any part thereof; and ought not to be stented, especially seeing the liberty of casting of seal is chiefly for building of houses and dikes, and he will declare he shall cast no more than will serve him and his cotters, in their housing. As for the custom of the country about common herds, that is only *ex pacto, et non ex natura rei*.

Act. Nisbet. *Alt. Gilmor.*

December 1. 1657.

K I R K T O N S contra R U T H E R F O O R D.

IN the action mentioned the 2d November, at the instance of the three sisters Kirktons contra Rutherfoord their tutor, for an accompt, It was *alledged*, No process, because there was nothing libelled to instruct him tutor, either by accepting or exercising the office. It was *answered* for the pursuers, That they opposed their father's testament produced, whereunto he was tutor nominate, and bearing expressly that he accepted. It was *answered* for the defender, That the extract being but the assertion of a notary, the commissary-clerk, cannot bind upon him to be tutor, unless he had subscribed a bond or act to that effect; according to the ordinary practise and act of Sederunt, whereby acts of inferior courts are declared to bind no man above L. 100, unless it be subscribed by himself, or being acts in course of process. It was *answered* for the pursuers, That they opposed the testament standing, beyond which was never more required, to produce the warrants, which the clerks will only produce in a reduction; and as to the act of Sederunt, it is only relevant to acts of caution, and others that are not of course, but of common, in the acceptance of all offices, is only judicial compearance

compearance and acceptance. The Commissioners repelled the defence in respect of the testament standing.

Brown, Clerk.

Eodem die.

GRIERSON contra ———.

GRIERSON, upon her contract of marriage with her husband, and infestment following thereupon, pursues a poinding of the ground against the tenants and present heritor. It was *alleged* for the defenders, *Absolvitor*, because they offered to prove, that the pursuer's present husband had another married wife, and that in her time he committed adultery with this pursuer, who was never his lawful wife, and so can have no interest in any infestment given to her in contemplation of the marriage as wife; especially she not not being in possession, but seeking possession. It was *answered* for the pursuer, That the defence ought to be repelled, because she offers her to prove, that her umquhile husband was, by a decret, divorced from the said former wife, before his contract of marriage with this pursuer; and that she lived with him, and was holden and repute his wife by the space of sixteen years; and so cannot *in hoc judicio* be put further to dispute or prove the marriage, or lawfulness thereof. The Commissioners, *in hoc judicio*, repelled the defence in respect of the reply; considering, that albeit, by act of parliament, marriage be prohibited unlawful with the person divorced with that person with whom he had committed adultery; and that there is adultery here alleged; yet, in this judgment, marriage being ordinarily probable by the contract, and being holden and repute the same ought only to be questioned in a reduction.

Balfour, Clerk.

Eodem die.

The Lady *T O F T* contra the Tenants of *T O F T*.

THE Lady, by her contract of marriage, being provided only to the annualrent of L. 1000 out of the lands of Toft, in recompence of L. 1200 of tocher, and with absolute warrandice against all inconveniencies, pursues a poinding of the ground. It was *alleged* for the defender, That the Lady must suffer deduction of the public burdens, according to the act of parliament 1646, anent liferenters. The Commissioners found the defence relevant, notwithstanding of the mean provision and clause of warrandice, which they found only to legal evictions.

Dounie, Clerk.

Eodem die.

COLINE contra CUNNY.

COLINE, donator to the escheat of a defunct, pursues Cunny his relict in a declarator to make forthcoming to him the rebel's goods. It was *alleged* for the defender, *Absolvitor*, because she was executrix confirmed to her defunct husband, and had, *bona fide*, made payment to his creditor of of his moveables, and was not obliged to know his rebellion, notwithstanding whereof his creditor might lawfully use diligence. It was *answered* for the pursuer, That, by the rebellion, the defunct's moveables became confiscate, not *in bonis defuncti*; so that his executors and creditors could have

no lawful right thereto ; and as for the payment *bona fide*, the same ought to be repelled, because he offered to prove, that the donator was put *in mala fide*, by citation, at his instance as donator, before payment made ; and therefore he ought to have suspended upon double poinding : Therefore the Commissioners repelled the defence, in respect of the reply.

Downie, Clerk.

December 1. 1657.

G R E I R S O N *contra* C R A I G D A R R O C H.

GRIZZEL GREIRSON, pursuing a poinding of the ground, upon her contract of marriage, against Ferguson of Craigdarroch. *Alledged*, That the party-contractor with her was married on another wife, who was living at the time of the contract. *Replied*, He was divorced from that wife, upon adultery committed by himself, before this contract ; and so being *solutus a vinculis matrimonii*, was free. *Duplied*, Grant he was divorced, yet he could not marry this Grizzel, because he committed adultery with her in that wife's time, and so, by the law, could not marry her. *Triplied*, Grant he had committed adultery, yet by no law is she prohibite to marry him. Likeas, the adultery not being declared in his time, and they having cohabite 20 or 30 years, and repute man and wife, the contract must stand, and this poinding raised thereon be sustained. The Judges repelled the alledgeance and duply, in respect of the reply and triply ; but the pursuer lost the cause, on the defect of probation, the witnesses adduced proving neither that they were married, nor repute as man and wife.

Act. Dunmuir

Alt. Fletcher.

December 2. 1657.

D E N M U I R *contra* E Y T O U N E.

AN incident was refused because it was not protested, for an act, though otherwise competent, but the time was circumduced, *qualificate*, that if the user of the incident produce the writs to prove, before the first of June, that it should be received.

Downie, Clerk.

December 4. 1657.

C O W I E *contra* Earl of C A L L E N D A R.

COWIE having pursued an action of ejection for a coal-pit, and the violent profits thereof, against the Earl of Callendar. The Earl proponed an exception, that he had deserted the heugh, and homologate his possession, by selling him the windows and tows. It was *alledged* for the pursuer, That homologation was only relevant, *scripto vel juramento*, to take away his standing, yet the defence was admitted ; but the Earl's colliers were rejected from being witnesses. The Earl succumbed, and having denied the quantities, the pursuer, being a poor man, after he had succumbed, got time to prove the quantities ; and, there being but one witness proving, the pursuer's oath was taken in supplement ; who deponing far above the libel, it was *alledged* for the defender, That his oath being only taken in supplement, was not of itself a necessary probation, but only *ad informandum religionem judicis* ; and there-

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fore might be made use of as they pleased, being in itself an oath *ex officio*; and therefore being exorbitant and unlikely, and not deferred by the defender's consent, no respect was to be given to it, at least other evidences to make approbation ought to be used, as the Earl's factor and coalgrieve's accompts, and their oaths upon the verity thereof. It was *answered* for the pursuer, That albeit this oath was termed the oath in supplement, yet in effect it was *juramentum in litem*, which is as well competent in ejections as spuilzies, both being of one nature, and might reach them above the true value *ad pretium affectionis*. The Commissioners ordained the said coalgrieve's and factor's accompts and oaths also to be taken in supplement, that the truth may be known.

December —. 1657.

ANNABLE TACKIT and JOHN MEIN her Spouse
contra ROBERT GILCHRIST.

UMquhile Jonathan Hollas, by his ticket, granted him to have received from the said Annable a bill of exchange, containing L. 13, 4 s. sterling, otherways to pay the money; and, being charged upon the bond, he found John Gilchrist cautioner, and suspended. After John's death, the said Annable arrested, and caused raise a summons of wakening of the suspension obtained at the instance of umquhile Jonathan, and contained Samuel Hollas to insist therein; and he not insisting, obtained protestation; and likewise pursued the said Samuel, as representing Jonathan's brother upon all the passive titles; and, upon citation at the cross of Edinburgh, obtained sentence, holding him as confest. Whereupon the said Annable pursues Robert Gilchrist the cautioner in the suspension for umquhile Jonathan, to pay to her the sum contained in the bill and ticket. It was *alleged* for Gilchrist the defender, That he being but cautioner in a suspension, is only liable, the principal being discussed, and then to represent him as lawfully discussed; for any sentence obtained against Samuel Hollas is null, because Samuel is an Englishman, and residenter in England, not liable to the jurisdiction of Scotland, which, if he had compeared, would have been relevant; which is yet competent to this defender, who is not called. *2do*, The ticket granted by Jonathan expresseth not, nor obligeth his heir; and so being between English persons, must be regulate by the law of England, that the heirs are not obliged, unless they be expressed. *3tio*, The act or bond of cautionry granted by the defender is not produced; and though he be craved to depone thereupon, he cannot be obliged, because his oath will not prove against the principal party, to obtain his relief, as a cautioner in a bond cannot be obliged to depone, unless the bond be produced. It was *answered* for the pursuer, to the *first*, That though an Englishman, residenter in England, is not conveyable in Scotland, by reason of his person, yet to the effect that any goods or lands he has in Scotland may be affected, or *cognitionis causa*, that his cautioner may be affected, he is conveyable as to this cause. To the *second*, opposes the ticket, dated in Scotland, betwixt two parties residing in Scotland, and so liable by the laws of Scotland; by which the person being obliged, the heirs and successors are also obliged, though not expressed. To the *third*, It ought to be repelled, seeing the pursuer offers to assign the ticket, which will be the defender's relief. The Commissioners found the replies relevant, in respect of the defence; and therefore decerned for the principal sum contained in the bill of exchange, and would
not

not grant annualrent therefor, but modified L. 3 sterling, damage and interest.

Balfour, Clerk.

December 10. 1657.

JOHN MARTIN *contra* DAVID WILSON.

THE Commissioners found a decret of the commissary of Fife, pronounced upon the first of August, null, not expressing a dispensation, and turned it into a libel, notwithstanding of the alledged custom of this, and other commissaries, to sit fifteen or twenty days in August.

Downie, Clerk.

Eodem die.

WILLIAM TROTTER *contra* MARION GIBB.

WILLIAM pursues Marion for a house-maill, set by him to her; she *alleges*, No process, because she was clad with a husband, and he not called. It was *answered* for the pursuer, That her husband, *viz.* Captain Law, was divorced from her, and turned pirate in 1649, and was still in rebellion and absence since; and so was *civiliter mortuus*, and she all this time kept a change by herself. The Commissioners found not process till the husband was cited, unless they alledge he was civilly dead, by forfeiture, though there be one case in Dury sustaining a process like to this.

Eodem die.

ARCHIBALD THOMSON *contra* ELISABETH DOUGLAS.

ARCHIBALD having apprised, from John Stewart of Coldingham, the barony of Coldingham, and all right he had thereto in *anno* 1631, pursues Elisabeth Douglas, as heir to her goodfire William Douglas of Blackerston, who, by a contract between him and two others, and John Stewart, wherein John disposed the lands of Coldingham, for relief of certain sums therein mentioned, and whereupon they were infested; by which contract they were obliged, jointly and severally, to do exact diligence for recovering of the rents of Coldingham, and to impute therein thir sums, and to make compt and reckoning thereof to the said John; the right of which contract being conceived by the pursuers apprising, the defender, as representing her goodfire-contractor, ought to make compt and reckoning of all that he or the other two did, or might intromit with, and impute the same in the sums, that the lands may be redeemable upon the superplus. It was *alledged* for the defender, *Absolvitor* from any compt and reckoning, or further imputing of mails and duties in the sums, because that obligation was already discharged by John Stewart himself, before any diligence done by the pursuer, or before they knew or were obliged to know her right; in which accompt and discharge all their intromissions were imputed in the sums, and the sums defaulted accordingly. It was *answered* for the pursuer, *imo*, That the alledgeance is not relevant, seeing at the time of the discharge John Stewart was fully denuded by the comprising, which needs no intimation, being a public solemn deed; and therefore the discharge taken from John was upon the defender's hazard, and cannot exclude the pursuer, being

being rights of reversions or heritable bonds, or conceived simply without infestment, intimation or any other solemnity; which neither by law nor practice is required. *2do*, In the most favourable case of tenants, their master's discharge will not liberate them against a singular successor, unless it bear, and be truly, upon real payment. It was *answered* for the defender, That he opposes his discharge, which bears true and real performance; and offers to make faith, that he did truly compt and give up his instructions, and imputed the intromission into the sums, as the discharge bears. *2do*, Albeit, there were no farther solemnities requisite but apprising, to convey the right of this contract, and that at the time of the discharge, John Stewart granter thereof, had no right; yet payment or performance done, *bona fide*, by the defender to the creditor must liberate; seeing there was no possible way by which the defender could know this comprising; and therefore the discharge was not upon the defender's peril: For though in all voluntary deeds and contracts, *bona fide* doth not avail, but that the contractor must take the hazard of the condition of his party; as one taking assignation to a bond formerly discharged, his *bona fide* will not secure him against the discharger, but payment made *bona fide*, by performance not voluntarily, but whereunto the defender might have been compelled, by sentence and poinding; wherein he knew not, nor could not alledge this pursuer's right, and could not call him in a multiple-poinding, having no way whereby to know. It was *answered* for the pursuer, That he was obliged and must be presumed to have known this right, by the denunciation of the lands upon the ground where he then dwelt; and by the denunciation at the market-cross, and by the public decret of apprising allowed and registered. It was *answered* for the defender, That these do infer neither obligation nor presumption of knowledge; for the denunciation at the ground, and citing all parties having interest at the cross, tho' it be intended that the people may get notice to preserve their rights, yet it infers no necessity of presumption of knowledge, as in declarators of redemption, all parties having interest are called, and yet it prejudgeth none but them that are specially called; and as for the decret or allowance, they are not ordained or declared before publication of such deeds, as registers of reversions and seifins, and so they need not be searched. The Commissioners, before answer, took the oath of Sir Robert Douglas, father to the defender, and successor to her goodfire, *ex officio*; who deponed, That the accompt was truly made without any collusion or unjust defalcation, and that he gave up the same, with the instructions thereof, to John Stewart, and that all their intromissions were compted, but not that John Stewart himself intromitted. The Commissioners found the defence upon the discharge relevant, and would take notice of no private knowlege that the defender, or her father, or goodfire, might have had, unless it were acknowledged by a public diligence.

Dounie, Clerk.

December 11. 1657.

JOHN OLIPHANT *contra* Mr WILLIAM BLACKBURN.

MR WILLIAM having obtained decret against John Oliphant, as lawfully charged to enter heir to his father, for payment of 300 merks; John suspends, and raiseth reduction upon minority and lesion, and craves to be reponed, to renounce to be heir to his father. It was *answered* for the pursuer, *1mo*, That his defence being upon compearance made for the minor, offering them renunciation, which was admitted, and that term circumduced,

duced, he can never now be again restored; for tho' a minor may have restitution against extrajudicial deeds whereby he is lesed, yet not against decreets of the supreme judicature, wherein he compeared. *2do*, Restitution can only be craved *re integra*, which is not here; for upon this decreet there is comprising, which would fall *in consequentia*, if the debt were reduced, or renunciation now admitted. It was *answered* for the suspender, That albeit minority cannot be restored against decreets of the supreme court compearing therein, the point of restitution consists in alteration of any point then found relevant, seeing that would dip upon iniquity; yet as to compearance omitting of a defence for not doing diligence, whereby the term is circumduced, in these a minor ought to be restored, as in those cases. *2do*, The admitting of a renunciation needs not take away the apprising; seeing the intent of the reduction is only to save the reducer from personal execution, in his own proper means, unto which he succeeded by his mother, to be free, but without prejudice of the apprising of any lands whereunto he might have succeeded as heir to his father. The Commissioners found the reason of lesion and minority relevant, with the said declaration, That it should only reduce the decreet and apprising, in so far as might concern the reducer personally, or his lands not flowing from his father after contracting of the debt.

Dounie, Clerk.

December 12. 1657.

THOMASINA TURNBULL contra the Laird of STOWS.

THE said Thomasina, upon her contract of marriage with George Turnbull, whereby George and his father are obliged to enter her in possession of Hoslipslad, to the rent of an hundred pound out of the said lands, during her lifetime, by virtue whereof, she was in possession ten years, pursues Stows to make payment of the same L. 100 of the years bygone, and in time coming. Stows *alleges*, he stands heritably infest in these lands; the pursuer's right being only personal, he ought to be assoilzied. It was *answered*, That an annualrent may be constitute by a contract of marriage, without an infestment, at least, that it ought to be held as a tack, especially being so long clad with possession, which could be interverted, but by a legal way, which was known to the defender before his right. It was *answered* for the defender, That his defence stands relevant, seeing he cannot be liable for the mails and duties; neither personally, because he represents not the contractor; nor really as intromitter, because the pursuer hath no real right by infestment, but a mere provision in a personal contract: And as to the possession, the benefit of a possessory judgment is not at all competent to a personal right; neither hath the defender or tenant done any thing wrong, in putting the defender in possession, because he would unavoidably have recovered the same in law, upon his infestment; and if he were disputing now, as the rents were in the tenant's hands, this contract can never exclude this infestment; and as to his knowledge, though he had known the pursuer's right or possession, his private knowledge operates nothing, and he knew it to be but an imperfect right. The Commissioners found the defence relevant.

*Eodem die.*Sir JOHN BAIRD *contra* Mr WALTER BRUCE.

MR. WALTER having obtained assignation of the Friar's house of Innerkeithing to be his manse, Sir John, as proprietor of the house, raised reduction of the assignation, on this reason, that the designation was not orderly, not being done by three ministers and three elders, conform to the act of Parliament 1649. It was *answered* for the defender, That part of the act of parliament 1649, was only where there was a new house to be built by a parish as a manse for the minister, whereby the expences were to be by the advice of the three ministers and three ruling elders; but here the designation was of a house already built, that was the only kirk-house of the parish; and so it proceeded by virtue of the acts of parliament 1572, 1593, anent manses and glebes, whereby the Bishop or Superintendent might design kirk-houses, in whose place the presbytery now succeeds. It was *answered* for the pursuer, That the designation was yet disorderly and not conform to these two acts; for the act 1572 gives only power to design parsons or vicars manses, but not any other kirk-houses; and the act 1593, is designed first of vicars lands and parsons, and next of friars or other kirk-lands; but relates not to the designing of old manses, or building of new; and it is without law or example, to compel an heritor of kirk-land, or kirk-house, not being old, a parson or vicar's manse, to suffer the same to be designed; for though the presbytery may design a glebe and ordain a manse to be built *de novo*, they cannot design a manse already built, though they should give him a price for it. The Commissioners found the reason and reply relevant, and that the designation was not orderly, and therefore reduced.

*Eodem die.*KATHARINE DICKSON *contra* GEORGE DICKSON.

THE said Katharine having obtained decret before the Commissaries of Edinburgh, against George, for the fifth part of her father's executory, George raiseth suspension and reduction upon iniquity of the commissaries, as having repelled his lawful defence, That there be no process at Katharine's instance, being one of the five executors, unless the rest had been joint pursuers or concurring, at least had been called *passive*; also in repelling the lawful defence, in respect of a relevant reply, *viz.* He alledged, *absolutor*, Because he had obtained discharge from the pursuer on her part, which was repelled, upon this reason, That, at the time of the granting of the discharge, George granted assignation to the like sums, and obliged him to deliver the bonds assigned; and because it was offered to be proven by the witnesses inserted in the discharge and assignation, that the discharge was granted upon foundation, that the said bonds were delivered, which the Commissaries unjustly sustained to be proven by witnesses, contrary to the law of this nation, whereby writ cannot be taken away by witnesses. The Commissioners found the reasons relevant, and therefore turned the decret into a libel; and, thereafter, the defender offering to prove the condition *scripto vel juramento*, the same was sustained.

Eodem

Eodem die.

WILLIAM DUNCAN *contra* PATRICK MOWBRAY.

WILLIAM M'BRAITH as principal, and John Mowat as cautioner, having granted bond to William Duncan, John Mowat satisfied the same and obtained assignation to the sum, and horning formerly raised in Duncan's name, with warrandice from Duncan's own deed, which he transferred to Mr Patrick Mowbray. M'Braith raised suspension, upon this reason, That William Duncan the creditor had granted him a discharge; which being produced, Mr Patrick takes a translation thereof, and, without insisting to discuss the suspension against M'Braith, pursues William Duncan to pay the same upon his warrandice and discharge aforesaid. William Duncan raised an advocacy upon the Sheriff's iniquity, because he had repelled his lawful defence; and that he could not be liable for the sum, upon the warrandice, by any deed done by him, unless upon that deed M'Braith had been assailed and freed, which was not; but the suspension raised by M'Braith was never discussed, in which — will concur, and wherein M'Braith will never be freed upon his alledged discharge; because, though it were a full and formal discharge, yet being posterior to William Duncan's assignation and intimation thereupon, yet should never liberate M'Braith. *2do*, It is not a discharge, but only a declaration, whereby William Duncan declares he is long since satisfied of the sum, that his name in the horning was used without his knowledge, and therefore discharges and disclaims the hornings in his name; which would never instruct, that M'Braith had paid the sum, and that he was satisfied, but only a declaration that the same was satisfied by James Mowat, who was M'Braith's cautioner; which defences the Sheriff unjustly repelled. It was *answered* for Mowbray, That he opposed the discharge produced, which discharges the horning, which horning was expressly assigned, and so the warrandice to take place thereon, the discharge of the horning after it was useless to heap up more expences, by discussing the suspensions. The Commissioners found the reasons of advocacy relevant, and advocate the cause; and ordained Mowbray, in the first place, to insist against M'Braith the debtor, and not to insist upon the warrandice until he was freed.

December 15. 1657.

WILLIM HUME *contra* JAMES INGLIS and the TENANTS of KINGLASSIE.

WILLIAM HUME, being infest in annualrent out of the lands of Kinglassie, pursues a poinding of the ground against the tenants of Kinglassie; compearance is made for James Inglis and others. It is *alledged* for James Inglis, That he is heir specially served and retoured to unquhile James Saltome his goodfire, in the lands of Kinglassie, who was infest in the property of the lands long before the pursuer's infestment of annualrent; and therefore would not suffer his tenants nor his ground to be poinded. It was *answered* for the pursuer, That James Inglis produces no infestment in his person, being only specially served heir to his goodfire, but not infest. *2do*, Though he did, yet his goodfire's infestment is but base, not clad with possession. It is *answered* for James Inglis, That he opposes his infestment which was clad with possession, in so far as, by the back-tack therein, the granter of the wadset became his tenant; and so

so his possession was the wadsetter's possession, in the same case as if his life-rent had been reserved. It was *answered* for the pursuer, That the back-tack was not sufficient, unless payment had been made of the annualrent, or back-tack duties thereby. The Commissioners sustained James Inglis's interest, though not infest, but repelled the alledgeance of possession without up-lifting the mails and duties for the annualrent. It was *alleged*, Not relevant, except only to give access and preference for the back-tack duties, but not to the full property; seeing the annualrenter's rights contain the benefit of the back-tack. It was *answered* for the back-tack, That it was expired by failures, conform to the clause irritant therein, and therefore the annualrenter could not crave the benefit thereof; yet the defence was only found relevant for the back-tack duty in this process, but prejudice to the wadsetter to declare in the failure as accords.

Downy, Clerk.

Eodem die.

CHARLES DALRYMPLE *contra* his DEBTORS.

CHARLES being executor confirmed to umquhile Adam Masson factor in Rochell, pursues Adam his debtor, confirmed in his testament; comparence is made for David Lindsay stabler in Edinburgh *ad omiffa*, who had confirmed other debtors; for whom it was *alleged*, No process at the pursuer's instance, because the ground of his confirmation was a ticket of 3000 livres granted by Adam Masson to the pursuer, which is null, wanting witnesses. *2do*, It was offered to be proven, that the said ticket was paid. *3tio*, The confirmation being done within six months after death, contrary to the orders emitted to the Sheriffs and Commissaries. It was *answered* for the pursuer, To the *first*, That he opposed his ticket, being between factor and merchant, dated at Rochell, betwixt them, or between merchant and merchant in merchandising, such tickets are always allowed, though wanting witnesses. To the *second*, The said David Lindsay hath no interest to alledge payment in this process, whereunto the pursuer, being executor-dative, may execute his office, and cannot be stopt by any other executor who has confirmed his *omiffa*; but if he had any executor-creditor pursuing him as executor, may alledge payment of his own debt, and so make him comptable for the whole, but not here. To the *third*, These orders to the Commissaries make not a nullity of confirmation within six months, but are only prohibitory, and declare all that confirm within six months shall come in *pari passu*. The Commissioners found the ticket valid, though without witnesses; and to shun multiplication of processes, admitted the alledgeance of payment to the other executor as payment.

Balfour, Clerk.

December 16. 1657.

WILLIAM TROTTER *contra* MARION GIB.

THE said William pursues Marion for a house-rent set by him to her. It was *alleged*, No process, because she hath a husband, and he not called. It was *answered*, That he needed not be called, being fugitive since 1649; which was repelled. But the pursuer further alleges, that the husband was forfeit by the parliament in anno 1649, and, in respect of the absence of the Register, referred the notoriety to the court. The Commissioners, in respect of the said notoriety thereof, repelled the alledgeance, in respect of the reply.

Eodem

Eodem die.

J O H N R O S S *contra* the Laird of M A Y.

J O H N R O S S, having obtained decret of registration of a disposition of lands, granted by his goodfire Dunbeath to him, against the Laird of May as heir-male to Dunbeath; which being suspended, obtained protestation, and thereupon charged and denounced May: He now pursues the Laird of May, and calls the director of the chancery, that seeing he had done all diligence competent in the law to obtain himself infest, that the lands must be adjudged to him, and the director of the chancery ordained to grant him precepts for infesting of him. It was *alleged* for the defender, No process, because the ground of his protestation was rescinded. *2do*, Because he had a reduction and improbation of that disposition and dispute in writ, which was prejudicial. It was *answered* for the pursuer, That he opposed his protestation, dated nine days before the deliverance, to rescind it; and as to the prejudiciality, the event of the reduction was dubious, and the production not yet satisfied, and there was no hazard to the defender by this sentence now craved, seeing it would fall in consequence if the disposition was reduced. The Commissioners sustained this process, and decerned, superseding the extract for a time, that in the mean time the defender might insist in his reduction.

Dounie, Clerk.

Eodem die.

J A N E T H U M E *contra* J O H N P A T E R S O N.

J A N E T H U M E having charged John Paterfon, upon a tack granted by her to him, he suspended upon these reasons, *first*, That the tack was innovate by a new agreement, whereby she was to discharge the former tack, and to grant a new tack for teind, and third; whereupon the suspender had obtained the decret before the sheriff, holding the charger as confest, and decerning to grant the new tack and discharge. *2do*, That she had warned him at Whitsunday, and in obedience thereunto he removed at Whitsunday, or within eight days thereafter. It was *answered* for the charger, That the sheriff's decret is unjust and null in itself, proceeding upon an irrelevant reason and libel, decerning the charger to grant a discharge of this tack, and a new tack upon a former agreement, which was most irrelevant; seeing, that before compleating of these writs, there was *locus penitentiae*, and so the charger might resale, and could not be decerned. To the *second*, the reason was not relevant, unless it were alleged, That the suspender removed at Whitsunday upon the warning; but the charger offered her to prove, That the suspender continued several months with his goods upon ground, and continues yet in possession of part of the houses. It was *answered* for the suspender, That he opposed his decret standing, which could not be taken away without either suspension or reduction. The Commissioners repelled the first reason, and found the decret null by way of reply, repelled the second reason in respect of the answer.

Dounie, Clerk.

December 17. 1657.

A Petition being given in for a warrant to registrate an inhibition, some few days being elapsed after the sixty days appointed for registration thereof,

thereof, the same was refused, though it be usual to grant it in the allowance of comprisings, wherein there is no nullity upon the not due registration.

Eodem die.

contra

A Decreet of a commissary found null by suspension, as being unjust, because this alledgeance, that the executor could only be decerned *secundum vires inventarii*, funeral expences, and expences of confirmation being deduced, and the decret was retrenched to the inventory, and the parties ordained to compt and reckoning.

Eodem die.

THE Bailies of Edinburgh supplicating, that warrant may be granted for demolishing some houses in Con's-close, which being visited by the dean of guild were like to fall, but the parties ordained to be cited before they were decerned to be built by the town upon the heritor's expence. See this *December 18.*

December 18. 1657.

Minister's RELICT *contra* Earl of CAITHNESS.

IN a pursuit at the instance of a minister's relict *contra* the Earl of Caithness, for a part of the stipend. It was *alleged* for the Earl, That it was only probable *scripto vel juramento*, being a matter of great importance, far exceeding L. 100. It was *answered* for the pursuer, That from the common rule, ministers stipends hath always been in exception, which hath no means of custody or preservation, or by any such right otherwise than by custom, by reason of the decease of the ministers, and vacancies of the Chamberlains, could not draw upon him that burden. The Commissioners found possession and use of payment to the minister as a part of stipends of that kirk probable *pro ut de jure*, being in possession.

Brown, Clerk.

Eodem die.

THE Bailies of Edinburgh supplicating that a warrant may be granted for demolishing of some houses in Con's-close, which being visited by the dean of guild were like to fall; but the parties ordained to be cited before they were decerned to be built by the town upon the heritor's expence. See this *December 17.*

Eodem die.

ROBERT FLETCHER *contra* the Tenants of INNERWICK.

ROBERT being infest in an annualrent of 9000 merks out of the lands of —, pursues the tenants for pointing the ground; the Countess of Dirleton compares for her interest, No process, because she is kened to a terce of these lands, which she bruiks *pro indiviso* with the heritor. Likeas, the terce is repeated in the pursuer's right; and therefore the heritor, nor none having right from him, can point the ground, until there be a division, especially seeing she hath a division depending, which is prejudicial. The Commissioners

Commissioners repelled and decerned, superseding the extract for a time, that the Lady might insist in her division; with certification, if the Lady failed, to extract the decret.

Donnie, Clerk.

December 19. 1657.

The COMMONWEALTH *contra* Sir JOHN DICK.

THE Commonwealth, upon an arrestment used in the hands of certain debtors of Sir William Dick's, pursues for making the arrested sums forthcoming. It was *alleged* for the defender, No process, because no party is called to defend this Sir William in the right of the sums arrested. It is *answered* for the pursuers, opposes their libel, wherein they have called Sir William's heir, who is known to die rebel, and would have no executor. The Commissioners found no process, till the nearest of kin of Sir William Dick were called, who had the interest of blood in his moveables.

Donnie, Clerk.

Eodem die.

The Laird of DALMAHOY *contra* his BROTHER.

DALMAHOY being upon a bond of L. 600 granted to his brother, being part of the annualrent of their portion, suspends, and insists upon compensation against the one, upon a bond due to the suspender by him. It was *answered* for the charger, No compensation, because the bond charged on is posterior to the bond upon which compensation is craved; and therefore, by the clause of the bond renouncing all exceptions, compensation is renounced. *2do*, That this being the annualrent only of the charger's portion the suspender was owing to him, the portion whereunto he was willing to compensate that other sum. It was *answered* for the charger, to the *first*, That he opposes the common practice, whereby, notwithstanding that ordinary clause in all bonds, yet all relevant defences, whether before or after, are receivable. *3tio*, To the *second*, That in compensation, or receipts not relative to a particular debt, *electio est debitori*. The Commissioners found the reason of compensation relevant and proven, and suspended *pro tanto*. It was further *alleged* against the other brother, Compensation to a sum, which that brother was due to the suspender, as executor to his mother. It was *answered*, That that sum was not liquid, seeing that by the practice produced, it was clear, that he was to have paid such a sum after compt and reckoning. The Commissioners repelled the second reason, in respect of the answer.

Balfour, Clerk.

Eodem die.

JOHN PHILP and Mr JOHN BAYNE his Assignee
contra Tenants of PITCAIRLY, and THOMAS CRAW-
FOORD.

THE tenants of Pitcairly having used a multiple-poining, compearance is made for Thomas Crawfoord, whose interest was a decret at his instance against the tenants, for making his duties forthcoming, arrested in his hands, upon a debt due by the Lord Lindores their master, whereto Thomas is assignee; upon which decret Thomas had poined, both by poining

pointing upon the ground of the land, and by parcels at the cross, which corns the tenants yet deferred, and therefore craved to be answered and obeyed as to his own proper corns lawfully pointed. It is *answered* for James Philp, That he must be preferred, because he stands heritably infest in these lands, and by virtue thereof in possession of the same, by obtaining decret against the tenants; and therefore, being master of the ground, it was not lawful for his tenant to have stopped the pointing, much less to have stopped the corns pointed. The Commissioners preferred the said James Philp.

Balfour, Clerk.

December 24. 1657.

JAMES PATERSON contra SARAH LOGAN.

THE said James pursues declarator of expiring of a backbond and wadset, granted by him to the said Sarah and her husband, against her and her husband's apparent heir. It was *alledged* for the defenders, *Abfolvitor*, because they offered them to purge the failure by consigning of all tack-duties at the bar, at the least offered them to prove, that the pursuer had got possession for seven years, whereupon they offered to compt and reckon, and to pay the superplus instantly. It was *answered* for the pursuer, That this clause irritant, being conventional by the consent of parties, and being incurred, the failure could not be purged; especially seeing the defender might redeem when he pleased, *multo minus* could not be purged by any compt and reckoning, which required delay. The Commissioners sustained the alledgeance upon present payment, but repelled that anent compt and reckoning; but reserved to the defenders as accords.

Eodem die.

ELISABETH SINCLAIR contra JANET JOHNSTON.

ELISABETH obtained decret against the said Janet, as executrix to her father, for L. 500 provided by the charger's father in his contract of marriage with the suspender, whereby all his means and goods were left to the suspender and the bairns of that marriage, except L. 500 left to this charger for her portion natural allenary. Janet suspends, upon this reason, That by the contract, the defunct was not obliged to pay L. 500, but it was only reserved to the charger. *2do*, That the charger was forisfamiolate before his death, and so cannot seek her portion natural, nor this sum for it. The Commissioners repelled the said reasons.

Balfour, Clerk.

Eodem die.

ANNA OGILVY and DAVID OGILVY her Spouse contra the Laird of INNERCARITY her Brother.

THE said Anna, being infest in an annualrent of L. 300 by her father, out of the lands of Kirrymuir, obtained decret before the sheriff of Forfar, against the tenants of Innercarity; compears the brother who suspends and produces horning against the husband, to bar him and his wife. It was *answered* for the charger, That she having no more than this provision granted to her by her father, her husband being debarred, cannot exclude her. The Commissioners debarred the charger.

Brown, Clerk.

Eodem

*Eodem die.*ROBERT PATERSON *contra* ROBERT DAWSON.

JOHN DICKSON younger in Kelfo, having granted a bond of L. 240 to Robert Dawson; he assigned the same with absolute warrandice to John Handyfide, which is come by progress, in the person of Robert Paterson, who hath charged and incarcerated Robert Dawson upon this warrandice. Dawson suspends, and alledges, No lawful exception or distress. It was *answered* for the charger, That he opposes a decreet of suspension and reduction, whereby the debtor John Dickson is assilzied, and the bond reduced upon the reason of minority and lesion. It was *answered* for the suspender, That the reply ought to be repelled, because the decreet is by mere collusion between Handyfide and the assignee, and Dickson the debtor; in which decreet the suspender was not compearing, nor intimation made to him; and if he had compeared, he would have alledged, and now alledges, That whereas, by collusion, Dickson's majority and the bond were referred to his oath, that it was to use; thereupon he has dispoed, and is assilzied: And the suspender alledges, and offers to prove by witnesses, That the lint and iron, for which this ticket was granted, was sold to the said John Dickson, who bought the same, as merchant, in his own name, and was accustomed to buy ware as a merchant. The Commissioners repelled the reason, in respect it would infer perjury against Dickson, and that Dawson was called in the said *absolutor*.

Downy, Clerk.

It was thereafter *alleged* for Dawson, That the warrandice imports no more than that the debt was a true debt, and unpaid, but could not reach to the annulling thereof by minority and lesion. *2do*, Albeit it could, yet it can only take effect, in so far as the assignee paid for the assignation, which was only a ticket of L. 80. It was offered to be proven by the ticket, in so far as it bears the same date with the assignation. It was *answered* for the charger, to the *first*, That he opposes the clause of absolute warrandice charged on, which must import the hazard of legal evictions, as if the bond had been null for want of witnesses. To the *second*, That the clause of warrandice being absolute, there is no reason to restrict it to the sum paid for the assignation; the ticket of L. 80, of the same date with the assignation, cannot prove it is the cause, much less the true cause; and it cannot be supplied by the oath of Handyfide the assignee, in prejudice of the charger Paterson, in whose favours he was denuded. The Commissioners repelled these two reasons, and found the letters orderly proceeded.

*Eodem die.*DAVID WILKIE *contra* THOMAS GILMORE.

DAVID having charged the said Thomas upon several letters at the instance of the taxmen of the impost, and having given for a special charge two tickets of entry; Thomas suspended upon this reason, That the whole wines entered were seized upon by the English, entering Leith, 1651; and albeit he was to give ticket at the entry, yet the impost and custom of its nature, is not due, till the wines were sold. It was *answered* for the charger, That he opposes the ticket, that entry was in December 1649, and April 1650; and the English not having entered till September thereafter, that ha-

zard cannot fall upon the tacksmen, more than if the wine was embarked. The Commissioners repelled the reason, in respect of the answer.

Eodem die.

Mr JOHN ANDERSON *contra* JOHN MAXWELL.

MR JOHN having obtained decret against John Maxwell, for delivering him his discharge unregistrate, which he had surreptitiously got out of Sir Lewis Stewart's hands, wherein it was deposited: John suspends, and insists upon this reason, That he had produced the principal discharge, with a declaration that he renounced the same, and that it should make no faith, and be as it were not registrate; and was content that the court should so declare, and take any other course thereanent, but could not produce it unregistrate, because it was booked before any pursuit. It was *answered* for the charger, That he opposed the decret therein, that some reason of imprestability was proponed and repelled. The Commissioners repelled the reason, in respect of the answer, and would admit of no equivalent, in respect the imprestability was through the fraud and fault of the suspender.

Downy, Clerk.

Eodem die.

JOHN CLUNNY *contra* WALTER STEWART.

JOHN having charged Walter to pay a bond of L. 20 Sterling, he suspended upon this reason, That, by the charger's back-ticket, of this same date, writer and witnesses of the bond, it is declared, That there was only L. 10 Sterling delivered of money of the bond. It was *answered* for the charger, No respect to the back-ticket, because it is not subscribed, and wants writer and witnesses designed. It was *answered* for the suspender, That he opposes the ticket subscribed by the two capital letters of the charger's name, and having writer and subscribing witnesses, which is sufficient, seeing the ticket was done in England; and, if need be, he offered to prove, that the charger is so accustomed to subscribe, or by the witnesses inserted, that it was so truly subscribed. The Commissioners sustained the reason of suspension, in respect of the reply.

Eodem die.

GRIZZEL GREIRSON *contra* FERGUSON of CRAIGDARROCH.

GRIZZEL GREIRSON pursues a poinding, *contra* Ferguson of Craigdarroch, of the ground, upon her seisin and contract of marriage with umquhile—; and she being formerly debarred, because it was *alledged*, her husband was married, and had another wife the time of her contract, whereby she could not be wife, nor have right to conjunct fee; and she having found out a decret of divorce, divorcing her umquhile husband from that former wife, and insisting, it was *alledged*, That she behoved yet to prove that she was lawfully married. It was *answered* for the pursuer, That she offered her to prove, that she cohabited with her husband sixteen years, and was all that time holden and repute his lawful wife. It was *answered* for the defender, *Non relevat* cohabitation holden and repute, because that was only a presumption of marriage, which could not prove here, in respect of a more pregnant contrary presumption, viz. That both her husband and she

she were pursued for adultery with her; and likewise, the decreet of divorce was against the husband upon his own adultery, not one deed, whereby he could not lawfully marry thereafter. It was *answered* for the pursuer, That we no law admitting marriages with persons divorced, even though their own fault; but, on the contrary, from the act of parliament, declaring that deeds of wives, divorced by their own fault, done in favours of the bairns of the second marriage, and in prejudice of the bairns of the first marriage, shall be null, acknowledgeth, that such marriages are not simply void; and for the husband's alledged taking with the guilt of adultery with this pursuer, *non relevat* to infer against her that guilt, for not being his wife: And it is not the solemnization of marriage only, but affection in conjugals, and cohabitation as man and wife, that does not only presume, but constitute marriage. The Commissioners sustained the summons in respect of the reply, to be proven by witnesses, by the pursuer's own exception condescended on.

Eodem die.

THOMAS FERGUSON of CAITLOCH
contra M'CULLOCH of MYRETON.

THE tenants of Borge suspend these two persons on double poiding. It was *alledged* for M'Culloch, That, *jure mariti*, he and his wife Margaret Roger must be preferred to Caitloch, because she stands infest upon her contract of marriage in *anno* 1615, which infestment was clad with her husband's possession: Likeas, she has been divers years in possession since his death, and now is in possession. It is *answered* for Caitloch, That he ought to be preferred, because he stands publickly infest upon a decreet against the Lord Kirkcudbright 1653, and hath obtained decreet against the tenants for the duties 1655, and received payment of the duties that year; and offers him to prove, that he, and his author John Lord Kirkcudbright, who are infest, and in possession above ten years; which must maintain him *in hoc judicio possessorio*, ay and while the liferenter reduceth his right. It is *answered* for the liferenter, That Caitloch cannot have the benefit of a possessory judgment, seeing himself hath not been in possession, but only by decreet of one year, and part of payment of that year; and he cannot make use of his author's possession and infestment, in prejudice of a liferenter; because his author is a common author, being infest as heir to M'Keller of Borge his father, who constituted the liferent to his mother: And tho' she had suffered him to possess; yet that can only be holden as a toleration, unless he would alledge, that he had a right. *2do*, The benefit of a possessory judgment, though it had been by Caitloch his own infestment and possession, yet will not exclude another infestment that hath been clad with possession, but only another infestment never clad with possession. The Commissioners preferred the liferenter.

December 25. 1657.

ROBERT HYSLOPE contra JOHN BROWN.

JOHN, being charged upon a contract betwixt him and Thomas Waddell to pay 300 merks, suspends on this reason, That, by the contract, it is clear, that this sum charged for, was for a quantity of victual, which Waddell was obliged to deliver to the suspender, which he has not done. It was

was *answered* for the charger, That Waddell, as not performing the part of the contract, cannot militate against Robert Hyslop his assignee the charger, who is not obliged to perform the cedent's part of the contract, neither is the obligation of paying of the money conditional upon the delivery of the victual, but both obligations are pure and simple. It was *answered* for the suspender, That, albeit an assignee to an article of a contract, is not obliged to perform a cedent's part in most cases, yet where the cedent's part is not only the motive or cause of contracting, but particularly is the mark for which the sum charged for is the price, it is equivalent to a condition, and the charger should not have therewith assignation, 'till he had known the victual was delivered. The Commissioners repelled the reason, and found, that no mutual contract, except the mutual obligations were conditional, would bear; but an assignee may charge for the one, tho' the other be not performed.

Brown, Clerk.

December 26. 1657.

The Laird of CLACKMANNAN *contra* MONTEITH
Messenger.

THIS Messenger having taken the Laird of Sauchy with caption, Clackmannan, to get him free for a time, gave bond to the messenger to produce him such a day, and took back-bond from him, that if Sauchy were taken, by any other caption, before that day, Clackmannan should be free, taking the messenger to the place where he was imprisoned: In which case the messenger obliged himself to deliver to Clackmannan his bond; whereupon Clackmannan charges the messenger, who suspends on this reason, that the bond was conditional, and the condition was not fulfilled. It was *answered* for the charger, That he offered him to prove, that the condition was fulfilled, in so far as, before the day that he was to produce Sauchy, he was taken by a caption, at the instance of one Galloway, which he intimated to the suspender, and sent his servant with him to Stirling, where he was in the messenger's house, and shewed him there, conform to an instrument produced. It was *answered* for the suspender, That the condition was not thereby fulfilled; seeing Sauchy was in a private house, and not in prison. It was *answered* for the charger, That his being in custody, in the hands of messengers by caption, made him a prisoner; and that it was alike for the suspender; seeing he might have there used his caption, as the charger protested he should. The Commissioners repelled the reason, in respect of the answer. And it was farther *alleged* by the suspender, That the allegiance was only probable *scripto vel juramento*, at least, by the execute caption thereof, and by the suspender's oath, seeing thereby his bond to deliver Sauchy was taken away, which could not be taken away by witnesses. It was *answered*, that the writ was not here taken away by witnesses, but by the back-bond, which was also writ, the condition whereof did not require writ; but the charger offered the truth of his instantly, by the witnesses inserted, and other witnesses, and could not be burdened to produce the caption, not being his own; and for executions of captions, their use to be none, unless the parties were put in the tolbooth. The Commissioners found the allegiance relevant to be proven by the caption, or the extract of the warrant, or other famous witnesses.

owry, Clerk.

Eodem

Eodem die.

GREIR and her SPOUSE *contra* Sir JOHN DALZIEL.

GRIER and her spouse pursuing Sir John as superior, to infest her upon a comprising, he debars her husband with horning; and so she not having concourse cannot pursue. It is *answered*, That the Husband might be excluded, in things wherein she had right *jure mariti*, yet in obliging infestment, his exclusion cannot debar the wife; seeing in that she might have action against the husband himself. The Commissioners repelled the the alledgeance in respect of the reply, and found process at the wife's instance.

Eodem die.

The TENANTS of SPITTLE *contra* JOHN BROWN and JOHN CHRISTIE.

THE Tenants having raised double poinding against the said parties, claiming their mails and duties, John Brown's title is a contract, betwixt his unquhile father and mother, and the Laird of Urehill in November 1631, for security of L. 1000, whereupon they were infest in an annualrent upon the 28th June 1632, and the Liferenter and her son obtained decret of poinding of the ground before the sheriff of Stirling upon the second of August 1655. James Christie produceth his author's infestment of an annualrent of 345 merks out of these lands, dated the 12th March 1653, with the confirmation of the town of Stirling superiors, dated 5th November 1653, and Laird Christie's feisin, with a decret of poinding the ground at Gloreat's instance, dated 5th July 1654. It was *alleged* for Gloreat, That he ought to be preferred, because he stands publickly infest, and Brown's infestment is only base. It is *answered* for Brown, That his infestment is long prior; and he offers him to prove, That it was clad with possession, by payment of the annualrent by the constituent thereof before Gloreat's infestment. It is *answered* for Christie, That *non relevat*, seeing any payment made was only upon the personal obligement contained in Brown's contract, but was neither by the tenants or any legal sentence upon the real right. The Commissioners found the alledgeance of possession, and of payment of the annualrent by the heritors or tenants, relevant to prefer John Brown.

Eodem die.

Mr ALEXANDER HAMILTON Minister at DALME-
NIE *contra* his PARISHIONERS.

THERE was an agreement between unquhile Mr John Dury, minister at Dalry, and his parishioners, for the quota and locality of his stipend to him and his successors. This minister pursues the present heritors and possessors for their years duties. It is *alleged* for John Fairholm, 1^{mo}, No process, upon the agreement produced, because it wants date and witnesses. 2^{do}, No process, because nothing is produced to instruct his title as minister. 3^{tio}, That not being a legal establishment, by decret of locality, cannot bind Mr John who is singular successor to the Earl of Winton, and Lord Kingstoun in their land. 4^{to}, It is not subscribed by any heritor for the time, but only by one Heriot, in name of the Earl of Winton, which Earl was only liferenter, and Kingston feuar. It is *answered* for the pursuer, That he

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refers the knowledge of his being minister to the defenders oath. *2do*, Condescends upon the date, which is left blank; and as for the witnesses, being many, subscribing, they are sufficient to stand for witnesses each to other. To the *third*, The burdens of stipend, locality and valuation, may as effectually be done by contract, as decreet. *4to*, He offered him to prove, that Mr John Fairholm hath homologate the agreement, in so far as he hath given in a deduction of the burden of the lands in his valuation. It is *answered* for the defender, That his craving deduction of his valuation, upon that ground, was only *ad majorem securitatem*, and will not infer an absolute homologation. The Commissioners repelled the alledgeances, in respect of the reply aforesaid.

Doune, Clerk.

December 29. 1657.

Mr ROBERT BURNET *contra* JOHN FORBES of ASLONE; the Laird of INNES *contra* ALEXANDER FORBES.

CASKYBEN, having apprised the Master of Forbes's estate, disposed a part thereof in wadset to Mr Robert Burnet, and, in warrandice thereof, other lands of his own, which he obliged him to make worth the annual rent of the money, as it then was; and thereafter disposed another part of the estate to John Forbes of Aslone. The apprising was led in the name of Doctor Johnston, Caskyben's uncle, who only was infest, and the which comprising being redeemed by consignation of 12000 merks, which being consigned in the hands of the clerk of the bills, Mr Robert Burnet got it up, upon caution to make it forthcoming to all parties having interest, whereupon it was arrested in Mr Robert's hands, at the instance of the Laird of Innes and Alexander Forbes, for the sums of money due to them by Caskyben, and thereupon Mr Robert raised a suspension of double-poincing. It was *alleged* for Innes and Alexander Forbes, That they ought to be preferred, because only they had arrested, which is the only competent diligence against the sums of money in question; and as for the two wadsetters, they have done no diligence, nor can have no right to the money. To the which it was *answered*, That this sum being consigned upon a redemption, these only can have right thereto who had right to the wadset-lands, and were redeemed. And it was *alleged* for Mr Robert Burnet, That he ought to be preferred to the other wadsetter Aslone, in so far as was wanting of his warrandice-lands, because he having got the first possession from Caskyben, common author of his part of the wadset-lands, with all right and title Caskyben had thereto, and that for a sum far exceeding the sum of 12000 merks, for which the lands were appraised and redeemable; that this must carry to him in effect Caskyben's whole right of the comprising; and Aslone having a posterior right, can claim no part of the money, more than if Caskyben had assigned the whole sum of the comprising to Mr Robert, and had disposed a part of the lands appraised to Aslone; in which case Aslone will get none of the money consigned for redemption. It was *answered* for Aslone, That seeing the money consigned came in place of the lands appraised, and redeemed thereby, and so belonged to them who were redeemed, and who behoved to grant redemption and renunciation, that thereby, seeing neither party had a particular assignation to the sum appraised for, neither yet to the apprising, but simply wadset of the lands, *communis juris*, which disposition did virtually carry Caskyben's right to the apprising, seeing under disposition all right to the disponent is disposed virtually; yet it can only be extended and understood to all these rights, in so far as they may relate to the land disposed in wadset; and therefore

therefore the first wadset can carry no more but the right of apprising correspondent to the lands; and the right of the second wadset must carry the right of apprising, in so far as may be extended to the lands in that wadset: And albeit Mr Robert had wadset the lands for a sum exceeding the sum in the apprising; yet that could not be interpreted as assignation to the whole sums in the comprising, neither could any such assignation take effect, seeing there was infestment upon the comprising in Dr Johnston's person, which could not be conveyed, but by disposition or infestment; but Mr Robert had otherways provided for his security and warrandice-lands. It was *answered* for Mr Robert, That albeit the first disposition of a part of the lands apprised could not carry the whole right of the apprising to strengthen the same, yet where the disposition was expressly for a sum exceeding the whole sum in the apprising, behoved to be holden as the meaning of the party, and the effect of the right, that the whole apprising was conveyed in security thereof. The Commissioners preferred Mr Robert Burnet, as having the first disposition of the apprised lands, for sums exceeding the sums apprised, or used the first infestment *cum omni jure*, to the other disposition of another part of the lands, upon a posterior infestment.

Eodem die.

*ALISON KELLO contra PATRICK HOME of
the LAW and his TENANTS.*

IN a special declarator it was found, That silver rent that exceeded L. 100 for one term was probable *pro ut de jure*.

Dounie, Clerk.

Eodem die.

Lady BLACKINGTON contra ROBERT SCOTT.

THE Lady, as executrix to Sir William Scott her husband, pursues the Earl of Roxburgh for payment of a bond of 5000 merks due to the defunct, and confirmed. It was *alleged* for Robert Scott the defunct's son, That he is provided to this sum by the bond of provision made by his father in favours of his sons. It was *answered* for the executrix, That that provision assigned Robert, not to the bond of 5000 merks due by William Earl of Roxburgh, which was after the date of the bond of provision, but to 6000 merks as a part of a bond of 7000 merks due by umquhile Robert Earl of Roxburgh. It was *answered* for Robert, That he offered him to prove, that this bond of 5000 merks was a renewed bond in part of the 7000 merks; and that being the defunct his own note written upon the back of the bond of 7000 merks produced, acknowledging the bond of 5000 merks to be a part of satisfaction given for a part of the 7000 merks. It was *answered* for the executrix, That that note was not subscribed. It was *answered* for Robert, That though it was not subscribed, yet offered to prove, that it was his father's hand-writ, and that the hand-writ was *notum* to all the hands, seeing his father was clerk of the Session. The Commissioners would not sustain the unsubscribed note, but ordained, before answer, the oath of the Earl of Roxburgh and his cautioners to be taken, whether the bond of 5000 merks was a part of the 7000 merks, or not.

December

December —. 1657.

MARY SHARP and Mr ROBERT WEIMS her Spouse
contra Lord BURLEIGH.

MY Lord and several other Noblemen borrowed 20,000 merks from unquhile Doctor Sharp, for the public use, in *anno* 1640, which the Doctor assigned to his wife; and my Lord having suspended, as being a public debt, the letters were found orderly proceeded in *anno* 1652, and she having transferred the same to her daughters, my Lord granted to them a new bond, and infestment of annualrent in security thereof, and, for a part of the annualrents, granted bonds of 2400 merks; which, with the principal bond, being suspended, it was *alledged* for my Lord, That by an order of my Lord Protector, and his council in *anno* 1655, upon the petition of the Lord Balmerino and others, it was referred to the council of Scotland, to take consideration of all debts contracted for the public in *anno* 1641, and preceeding, and in the mean time all legal execution upon these bonds, or any real bonds granted for them, or apprising or securities therefor, should cease; and therefore these bonds, being renewed bonds for Doctor Sharp's bonds granted for the public use, execution thereupon, and the poinding of the ground upon the infestment, and security thereof, should cease till the council do determine. It was *alledged*, 1^{mo}, That, by the decret against my Lord in *anno* 1652, the first bond was not made public, but private debt. 2^{do}, My Lord had used no diligence that the council might determine. 3^{tio}, By the act of parliament called the *Petitioners*, and the act rescissory, this nation is to be governed by its own laws only, and all acts and ordinances are rescinded. 4^{to}, My Lord had passed from the benefit of that act, in so far as he had, not only paid annualrent for the same, but, by his several missives produced, had acknowledged the debt, and promised to do all that was in his power for satisfaction, and offered his lands, bonds and person; and the bonds of 2400 merks were granted after that act. It was *answered* for my Lord Burleigh, That it was notour, that Doctor Sharp's bond was a public debt, and he had received annualrents from the public, and the decret in *anno* 1652 proceeded not upon that bond that was for the public; but now this act sisting, execution was supervenient, and there was no obligation lying upon him to move the council; and for the late act of parliament, they merit not the order which is only a supersedere of execution for an *interim*, which may be well granted by the Protector and his council; and as to his missive, and the late bonds after, the act is general, and comprehends all securities for the public debts. The Commissioners found the letters orderly proceeded for the two bonds after the act, and in respect of my Lord's missive offering land, decerned in poinding of the ground, and superseded to give answer in the rest for a time.

Brown, Clerk.

Eodem die.

ROBERT HYSLOP *contra* JOHN BROWN.

THIS dispute being agitate the 25th December instant, John Brown the suspender, being ordained to be farther heard, *alledged*, That the letters ought to be suspended for 300 merks, contained in this contract, because not only it was the price of the victual obliged to be delivered, but likewise the assignation was made to the cedent's own son-in-law, and no mention
 made

made of it this 29 years, there being several actions and bargains betwixt the parties; and they instance the cause of a tack by contract, the duty being assigned, his reason would be relevant against the assignee, that no duty ought to be paid, because the tacksmen was never put in possession; and if this were sustained, it would mar all commerce, if parties were decerned to pay the price, before they get their ware. It was *answered* for the charger, That the obligation in the contract was not conditional upon delivery of the victual, but pure, and for the circumstances now alledged, they were not relevant to alter the case; and as for the duty assigned for a tack, it merits not, because the tack-duty is not pure; it merits for the use and fruits of the ground, and has therefore that condition implied, that the tacksmen must have the use and fruits of the thing locat, which he is to pay the master; but it is not so in buying and selling: And as for the inconveniency, it would be far greater on the other hand, if *jure obligationis*, in mutual contracts, could take no effect in the person of assignees, unless they first instruct the cedent's part performed, and would annul comprisings led or to be led thereupon. The Commissioners adhered to their former interlocutor, and found the letters orderly proceeded.

Eodem die.

JOHN MURRAY of KIRKHOUSE *contra* the Earl of TRAQUAIR.

JOHN MURRAY, as tutor-dative to umquhile Gavin M'Caill minister at Traquair, having obtained decret against the Earl for the rest of his stipend for the year 1634, and proceeding conform to a fitted accompt, and for rests for years subsequent till the ministers death, and for the time after his death. The Earl suspended, and raised reduction on these reasons, That albeit he was compearing in the decret, and a time taken to produce him; yet the same circumduced without any other dispute; yet his advocate declared upon oath, that he was fraudulently informed, in the Earl's absence in England, that he should not oppose the decret; and therefore craved only to be reponed to such defences as would be instructed in writ, and were *in jure*, viz. the letters must be suspended for a time, because it was not in *bonis defuncti*, and cannot belong to his executor, but only to his wife and bairns, *proprio nomine*. 2do, He craved allowance for tickets, extending to 1000 merks granted by the minister in part of payment of his stipend after the fitted accompt. 3tio, The minister, by his testament, had left a special legacy of 1000 merks, due by the Earl to the poor of the kirk at Traquair, and was acknowledged by the present minister's letter. It was *answered* for the charger, That he opposed his decret *foro contradictorio*, which ought not to be loosed upon the declaration of an advocate, specially seeing there were thought in the matters for which he craved to be reponed; for as to the time, it hath been found both conformable and liable to the defunct's debt; and the suspender hath no interest as to the tickets produced; they meet, seeing the debt is not for the whole stipend after the accompt, but for a part thereof, as the minister gave it up in testament; and as to the security granted for in the legacy, howbeit it be a special legacy, yet the executor is liable in the legacy, and it is proper to him to lift the same, and to employ it according to the will of the defunct. And therefore the alledgeance is not relevant, unless the Earl had secured the son and recovered the minister; neither is yet security given, because the minister's letters bears to the Lord Lintoun, who is in fee of the testament, should have

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subscribed

subscribed the security, and have not. The Commissioners repelled the reason anent the time, the charger finding caution to warrant the suspender at all hands having interest; and as for the tickets, ordained compt and reckoning of the whole stipend since the fitted accompt, and that it might appear whether the rest given up to the minister were right, and did allow all these tickets; and for the legacy, found all the letters orderly proceeded, ay and while the Earl secured the same, and repeated discharge to the executor.

Dounie, Clerk.

Eodem die.

Sir ROBERT HEPBURN *contra* Sir GEORGE MONRO.

THE said Sir Robert, having arrested the farms of Major-General Monro's lands, intromitted with by Sir George Monro, pursues for making the same forthcoming for payment of a debt due by the General to the pursuer; and referred the same to Sir George's oath, who gave a qualified oath, bearing, that any intromission he had was in satisfaction of greater sums due by the General. It was *alleged* for the pursuer, That the quality ought to be delete, and the defender ought to depone *simpliciter*, because the quality was a defence, and did not condescend what the debt due to the deponent was, and by what security, nor by what power and warrant he intromitted, or what were the quantities. It was *answered* for the defender, That the quality was very proper; and if the pursuer would not accept of that oath, he might refuse from it, and prove otherwise. The Commissioners ordained Sir George's oath to be taken upon the qualified oath, and interrogators to be given in by the pursuer anent the quantity and way of intromission, and the debt due to the deponent; and that they would take consideration of the quality, as they should find cause after the oath.

Brown, Clerk.

January 1. 1658.

CUNINGHAM *contra* Lord DALHOUSIE and L. RAMSAY.

THE umquhile Countess of Dalhousie, having borrowed a sum of money from this Cuningham, he pursued her husband as he who intrusted her with his affairs in his absence, during which time the sum was borrowed and homologate by my Lord as his own debt, by payment of a part thereof, which was found relevant of consent. But it was *alleged* for the Lord Ramsay, who was conveyed as intromitter with his mother's goods, That albeit the sum might affect his father *jure mariti*, yet it being granted by a wife clad with a husband, as to her, or any representing her, it was null. It was *answered* for the pursuer, That the sum being borrowed in absence of the husband, and received by the wife, and converted to her use, the wife was obliged, and had executor, and all representing her. The Commissioners found the alledgeance relevant for my Lord Ramsay, and assolizied him.

Douny, Clerk.

Eodem

Eodem die.

Mr JOHN STEWART Minister *contra* the Tenants of CRA-
MOND.

IN an action, at the minister's instance, for proving the quantities of his stipend, they produced a diligence; against which he *alleged*, That the execution was false, and offered to be improven. The Commissioners sustained the diligence, and reserved his action as accords.

Dounie, Clerk.

January 2. 1658.

Mr JAMES CHULVEINS and SKROGIE his wife *contra*
ARTHUR SMITH.

THE said Mr James and his spouse, pursues the said Arthur Smith, as behaving himself as heir to his father, by intromission with his heirship-moveables, and intromitter with his moveable gear. It was *alleged* for the defender, *Absolutor* from these two passive titles; because his father at his decease had no moveables, seeing he died rebel, and his escheat was gifted to Mr Roger Mowat, and thereupon both general and special declarator obtained. It was *answered* for the pursuer, That the defence ought to be repelled, because he offered him to prove, that the rebel, notwithstanding the gift, and these declarators, continued in possession till his death; and therefore, by act of parliament, the gift is presumed simulate to the rebel, as to the rebels behoof, and so null. It was *answered* for the defender, That the *dato* or gift was so presumed simulate, yet, *hoc ipso*, that his father was rebel, the goods belonged to the fisk, to whom he was comptable, and not both be liable for them to the fisk and his father's creditors, much less could he be thereby liable for all his father's debt. The Commissioners sustained the defence to make the defender liable, only for the avail of his intromissions, and to purge the universality of these passive titles.

Dounie, Clerk.

Eodem die.

BRYSON *contra* ALEXANDER.

IN an action, Andrew Bryson against Alexander, found, that where a decret or bond is turned to a libel, that the cautioner or attestor is free in the suspension, though the letters be found orderly proceeded.

January 3. 1658.

FORREST *contra* LESLIES.

FORREST being bound by contract of marriage, to pay to Leslies 12,000 merks, in tocher with his daughter, is conveyed for payment of it. And *alleges* the contract is but a minute, and subscribed only by one notary, the sum being above L. 100, and wanting a donation *propter nuptias*, to his daughter, it can be no ground of a pursuit against him. *Replied*, In a contract of marriage, one notary's subscription is enough, there being no law against it, and sundry practiques were *alleged* for it; and though there was nothing provided to his daughter *in compensationem dotis*, yet it must tie for all that, *nam sibi imputet*: Yea, in the contract he has dispensed with it,
and

and with all other defects whatfomever. *Duplied*, A notary cannot tie one for a sum, exceeding in L. 100 Scots, and that the dispensatory clause in the contract could tie, being only subscribed by one notary, as said is. The Judges sustained process on the minute, and decerned the defender to pay to the pursuer, employing the sum to himself and his wife, and the longest liver of them two, and the bairns of the marriage.

Act. Sinclair.

Alt. Gilmour.

It was also *alleged* in this process, the husband struck her, and hungred her.

January 5. 1658.

MARGARET STIRLING *contra* the Laird of
G L O R A T.

MARGARET STIRLING pursues the Laird of Glorat for payment of a sum of money, he excepts upon compensation of a liquid sum. It was *answered* for the pursuer, That the alledgeance of compensation was not relevant, unless, according to the act of parliament, it be instantly verified. It is *answered* for the defender, That albeit the tenor of the act of parliament, yet in ordinary actions a short time is granted. The Commissioners sustained the defence of compensation, and granted a short time.

Dounie, Clerk.

Eodem die.

B R O W N *contra* B A I L L I E.

BROWN, upon a debt owing by Baillie, having arrested all Baillie's moveable goods in Baillie's own hand, pursues Baillie for making the arrested goods forthcoming. It is *answered* for the defender, No process, because the arrestment is only general of the debtor's whole goods, which ought to have been special, and the goods ought to have been under the messenger's hand, or view of the arrestment. *2do*, Moveable goods, tho' they may be arrested to the effect, that thereafter they may be poinded; yet they cannot pursue to make them forthcoming in payment of the debt, because they are not liquid; and therefore, can only be liquidable, by the poinding and apprising thereof. *3tio*, No such pursuit was ever sustained, to arrest a man's whole goods in his own hands, but the pursuer may follow an ordinary course, either by poinding or a decret of payment. It is *answered* for the pursuer, to the first, That there is no necessity of the messenger arresting particularly, or having them under his view more than sums of money, and he opposes his condescendence given in, both expressing the particulars and prices; and therefore, though he might poind, yet there is nothing to exclude him to use this way, competent to pursue his debtor to make the goods arrested in his own hands forthcoming at the prices. Likeas, he shall prove the true prices thereof, specially seeing there is no party competing with him, but his own debtors. The Commissioners sustained the summons.

Dounie, Clerk.

Eodem die.

Eodem die.

FERGUSSON and his Spouse *contra* CREDITORS.

WILLIAM FERGUSSON, and Janet his spouse, pursues their creditors for obtaining liberation *super cessione bonorum*, wherein both the man and the wife offer disposition of their goods. It is *alledged* for the defenders, against the husband, *Absolvitor*, because his instructing, by a testificate of the magistrates, where he alledgeth himself to be incarcerated, that he did only come in fraudulently into the tolbooth to see his wife, and did cause take instruments that he was in the tolbooth, but was never put in by them. In respect whereof, the Commissioners assolizied; and as for the wife, it being *alledged* for her, That she being a wife, could not be incarcerated. It was *answered*, That she was *præposita negotiis*; it was that that bound, not herself, but her husband; and that however, she could not be incarcerated being a wife. The Commissioners found, that there was nothing libelled upon this ground in this process, but only *super cessionem*; and therefore gave no answer, but declared, that, upon a bill of suspension, they would, without caution or consignation, give warrant to suspend, relax and set at liberty.

Balfour, Clerk.

Eodem die.

Tenant of Sir JAMES HOME *contra* LYELL of CASSINDINE.

LYELL of Cassindine, as assignee by Sir George Home, to a year's duty of Sir James's tenant, having charged the tenant at his dwelling-house, poulded him; the tenant now pursues spuilzie. It is *alledged* for the defender, *Absolvitor*, in respect of the lawful poulding produced. It is *objected* against the poulding, *fiist*, because by the poulding and the pursuer's tack, which is the ground of his tack, it is clear, that the poulding was before the time of payment. The Commissioners repelled the defence, in respect of the reply.

Eodem die.

EWING *contra* Sir CHARLES ARESKINE.

EWING having pursued reduction *contra* Sir Charles, and he having taken a time to produce simply without reservation, and the act being called, the pursuer craved certification *contra non producta*. It was *alledged* for the defender, No certification for any of the writs called for, because there was no reason libelled against him: It was *answered* for the pursuer, That he opposed the state of the process, wherein there is an act for production without any reservation, and this being competent before the act, he is not now holden to dispute the same. The Commissioners ordained the time to be disputed.

January 6. 1658.

Mr JOHN BOIG, *contra* the PRESBYTERY.

MR JOHN BOIG, deposed from his ministry at Kirkliston, making address to the presbytery, they, by their act, by the entry of his successor, promised

promised to secure him of L. 80 yearly, during his lifetime, out of his successor's stipend, and to give him L. 20 yearly farther; whereupon, he having obtained decret against his successor, and presbytery in absence, it was *alledged* formerly for Mr Robert Hall his successor, That he could be liable to no part of the L. 80, because the time of the act he was not admitted minister, nor was not of the federunt, nor did not consent; and that, without his consent, the presbytery could not burden his stipend or himself; which was found relevant, and thereupon the letters suspended as to him. Now, most of the remanent presbytery suspended upon this reason, That this being but an act of the presbytery, cannot infer a burden or obligation upon their successors, and most of the suspenders were then ministers; the act can oblige none who were not present and consenting; because, matters being carried in presbytery by plurality, they have no power as a presbytery, to oblige or burden any of their members for sums of money; and therefore, unless it were *alledged*, That the particular suspenders did vote *affirmative*, and consent, the act cannot bind them. *3tio*, The act being but an extract under the hand of the moderator and clerk, cannot prove the sum of L. 100 yearly, unless subscribed by the presbytery, as neither will an act of the court of a borough, and the borough and persons therein. The Commissioners found the act only to bind the ministers that were present and consenting, and their consent to be proven by their oaths, and thereby to be liable for the proportionable parts, with their remanent brethren then present: And it being questioned, Whether the act expressing brethren, could comprehend the ruling elders in the federunt, it was thought it did; but the interlocutor was holden generally against the brethren proportionally.

Brown, Clerk.

Eodem die.

MARY ELPHINSTON *contra* TENANTS.

MARY ELPHINSTON, by her contract of marriage to Peter Johnston, being provided to the liferent of all he should conquest, with this provision, that if she survived, and that there were bairns one or more not provided sufficiently for their maintenance and education, that she should renounce the half of the conquest in their favours; whereupon she pursued the tenants of the conquest-tenements for mails and duties. It was *answered*, No process, because the pursuer was not infest, and had no real right upon her naked contract. *2do*, Her husband's heir, who was fiar, was not called *3tio*, It was not yet declared, that these lands were conquest during the marriage. It was *answered* for the pursuer, *1mo*, That a liferent being but a servitude, may be so constitute by a contract of marriage, That albeit, it would not exclude a singular successor; yet the heir of the contract, who was obliged to grant infestment, could never object the want thereof. *2do*, No necessity to call the heir, because, as being the same person in law with the defunct, he was the pursuer's author. *3tio*, There needed no preceeding declarator to pay what was conquest, that being a part of the libel, that this land was conquest, which the pursuer offered to prove. The Commissioners sustained process. And it was now farther *alledged*, That the heir behoved to be pursued for the one half of the duties of the conquest-lands, because the pursuer her mother liferented all; and the condition was extant, that her father left not sufficient maintenance for her entertainment and education. It was *answered*, That the education did not exist, because the pursuer offered to prove, that the defunct left the half of a tenement unliferented, which was worth L. 60 *per annum*; and albeit, it

it was burnt, yet it was extant the time of the defunct's death; and that the heir had the stock of several sums of money and some moveable-goods. Likeas, the mother offered to entertain and educate her in her own family. It was *answered* for the heir, That she would accept no such offer, but craved the half of the conquest; seeing the condition was existant, because L. 60 was not a sufficient maintenance for the only daughter of a Bailie of Glasgow, and for the executry, it was exhausted; and it was unreasonable that the heir should exhaust principal sums. The Commissioners found the condition to exist, and therefore preferred the heirs as to the half.

Deunie, Clerk.

Eodem die.

H O M E *contra* M A R G A R E T A N D R E W.

U M Q U H I L E Patrick Home of the Law, having granted a bond of 9000 merks to umquhile Samuel Calder, and the said Margaret Andrew his spouse, and the longest liver of them two, and their heirs; the said Margaret, after her husband's decease, pursued for the annualrent, and obtained decret; which being suspended, another Home became cautioner; and the letters being found orderly proceeded, the cautioner raiseth reduction of both on this reason, That the said Margaret Andrew could have no liferent, because her husband and she had uplifted the sum, and both had granted discharge produced. It was *answered* for the said Margaret, That she opposed the said two decreets *in foro contradictorio*. It was *replied*, That these decreets, not being against this pursuer, but against the principal, for whom he became cautioner, could not exclude him. *2do*, Even in the first decret, it being then alledged and instructed, that the husband had lived and discharged the sum; the same was found relevant, in respect of the clause, whereby it was payable to the husband and wife and longest liver: but upon a bill given in for the said Margaret, a day after the session, the letters raised were found orderly proceeded; and therefore the first defence was yet competent to the defenders, who were neither competent, nor called, much more when he produced not only the husband's, but also the said Margaret her discharge. The Commissioners found the reason relevant; yet repelled the same, in respect of an exception of improbation of the discharges produced.

Eodem die.

C L E R K *contra* E L L E I S.

S I R John Smith being debtor to James Elleis factor in a sum of money for arms, and likewise he and the other Commissioners that went to Holland, being debtor to James, the remanent factor at Camphire, for 10,000 guilders. John Clerk for 7000 guilders, owing to him by James Elleis, arrested all sums due to him by Sir John Smith; and thereafter, in a fitted accompt betwixt Sir John and James Elleis, wherein the balance was equal and subscribed by James Elleis in the discharge, Sir John was appointed to pay John Clerk; whereupon he made an absolute promise to pay him; but, before payment or security, the factor granted assignation to Mr James Elleis of the sum contained in the accompt, and to James Elleis of his payment of the bond of the guilders; there being a competition between John Clerk and Mr James Elleis for the sum in the compt. It was *answered* for John Clerk, That he ought to be preferred, because, before Mr James Elleis's assignation or intimation by the fitted accompt, James Elleis was denuded, and right was acquired to John Clerk by the article of the discharge ordaining Sir John to pay him; and by subscribing
of

of the equal balance of accompt, which, amongst merchants, was equivalent to a discharge. It was *answered* for Mr James Ellies, That the article of the discharge was only a mandate or order, which was revokable, and was revoked by Mr James's assignation, before payment made, or surety made by Sir John. It was *answered* for John Clerk, That he opposed the accompt, which was not a revokable mandate, but was, in effect, a discharge, and delegation, constituting Sir John debtor to John Clerk: Though it were a mandate, yet it behoved to have been alledged to be revoked by the assignation *re integra*, which would be, because Sir John Smith had given an absolute promise before the intimation. The Commissioners, before answer, ordained Sir John and John Clerk's oaths to be taken *ex officio*, Whether there was an absolute promise before; and that after the intimation the sum was satisfied by Sir John, at least security granted for it. The Commissioners, after advising the oaths *ex officio*, found that the sum could not be admitted to prove the absolutor's promise against Mr James Elleis, but only Mr James's oath or writ; and, by the opinion of merchants, found that the subscribing of the bond or compt was no discharge, but the order was still revokable, before it was accepted by John Clerk, and James Elleis's bond retired there for John Clerk. Mr James Elleis was preferred unto the accompt, whereupon John Clerk returns unto the arrestment of the gilders; and alledges he must be preferred to James Elleis, because his arrestment is long before Patrick Elleis's assignation, whereupon he had obtained decreet. It was *answered* for Patrick Elleis, That John Clerk could never compt with him; because he and Sir John Smith, by their oaths *ex officio*, acknowledged John Clerk's sum to be satisfied. It was *answered* for John Clerk, *Non relevat*, unless they would alledge satisfied by James Ellies the debtor, by the oaths only proved satisfied by Sir John Smith, and who had taken assignation thereto; and now seeing Mr James Elleis was preferred to the sum in the accompt, there was nothing to hinder him to return upon the gilders due to his debtors, upon his prior arrestment. The Commissioners preferred John Clerk, in the first place, and Patrick Elleis in the second.

Downie, Clerk.

January 7. 1658.

GEORGE MORISON *contra* the TENANTS of ELSICK.

GEORGE MORISON Provost of Aberdeen having apprised the lands of Ellick from umquhile Bannerman of Ellick, and being infeft therein, pursues the tenants for mails and duties. It is *alledged* for the the defenders, *Absolutor*, because they are tenants by payment of mails and duties to Bannerman, now of Ellick, their Master, who stands infeft in the possession, long before the pursuer's infeftment upon his apprising; and any right competent by the apprising, can only be of such right as was in the person of umquhile Bannerman, from whom he comprised, which was only his liferent, this Ellick being infeft in the fee long before, and which liferent is now extinct before the years libelled, by umquhile Ellick's death. It is *answered* for the pursuer, That the defence ought to be repelled; because this Ellick's infeftment, whereupon it is founded, is granted by his father, after contracting of this pursuer's debt; whereupon he comprised, and thereby this Ellick is debtor, as successor *lucrativo* to the pursuer, and so he can never be heard to pretend his right in the prior's prejudice. It was *answered* for the defender, That though by his infeftment he were lucrative successor, and thereby

thereby obliged to pay the debt; yet that being a personal obligation could not come in here to extend the right of a liferent, which was only comprised, farther than its own nature, the right of fee not being in that person; and it was not alike as if the pursuer had an investment or disposition containing warrandice, in which case the warrandice might exclude the lucrative successor of the disponent; but in this apprising there is no warrandice, nor any thing to be apprised but a liferent, which is extinct. The Commissioners found the defence relevant, notwithstanding of the reply, but prejudice of that, or any other title passive, or reason of reduction, as accords.

Dounie, Clerk.

Eodem die.

J E A N B E Y N E contra H E N R Y C O U P A R.

JEAN BEYNE being possessor of a room, wherein she and her umquhile husband had a tack, belonging to the Lord Balvaird, who, being out of the country, had constituted Mr John Barclay commissioner and factor in all his affairs; and by contract betwixt the said Mr William and Jean her consent on the one part, and Henry Cowpar on the part, that room was set to Henry for nineteen years, reserving to Jean certain houses and acres thereof, and some coals and poultry yearly, and Mr William was obliged to procure the Lord Balvaird's ratification or renunciation of the tack; whereupon Jean charges Henry Cowpar for her part of the duties, and Mr William to fulfill his obligation: And they suspending, it was *alleged* for Henry Cowpar, That he could not be liable for these duties, because he hath renounced his tack to the Lord Balvaird, with whose commission he had only transacted. It was *answered* for the charger, That Henry Cowpar could not renounce the tack, wherein there was articles in her favours, without her consent, to her prejudice; and that registration and horning was competent to her upon that contract, for the articles therein produced in her favours, herself being a consenter. The Commissioners repelled the reasons, and found the letters orderly proceeded against both.

January 8. 1658.

A N D R E W B R Y S O N contra — A L E X A N D E R S.

ANDREW BRYSON pursues — Alexanders, as they who attested the cautioner found to him by Melrose, and declared they should make him sufficient; upon which suspension he had obtained decret, whereby the cautioner was liable; and he being altogether insufficient, as having made *cessio-nem bonorum*, before the attestation, the attestors ought to be decerned to pay the sum for which he was cautioner. It was *answered*, No process, because the attestation, as it is libelled, at most, can only make them liable subsidiary, after the cautioner in the suspension is discussed and found insufficient. It is *answered* for the pursuer, That he produceth the cautioner *cessio bonorum*, after which he can have no goods; and so needs no farther discussing. It was farther *alleged* for the defenders, *Alsolvitor*, because, in the discussing of the suspension, the pursuer's decret was turned into a libel; whereupon there is no decret of suspension finding the letters orderly proceeded; but a decret as in an ordinary action, whereby the cautioner is liberate, *multo magis*, the attestors. It was *answered* for the pursuer, *Non relevat*, unless they will alledge the decret was reduced, and that the interlocutor had borne expressly the decret to be turned into a libel, and the cautioner

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liberate.

liberate. The Commissioners found the second defence relevant and proven, and therefore assolizied; for though that the turning of the decret into a libel behoved to be upon a defect in it with rigour, which would reduce it simply; yet it was favour to him, to prevent the multiplicity of proceses, to sustain it as a libel.

Balfour, Clerk.

Eodem die.

T U R N B U L L of *M I M K I E* contra the Laird of *M A C K E R S T O N*.

TURNBULL of Mimkie pursues the Laird of Mackerston for adjudication, having obtained decret, *cognitionis causa*, against him before. In which process compearance is made for Pendance M'Dougal, and other of Mackerston's creditors, who alledged *absolutor*, because she offered to prove that the sum, whereon the adjudication was craved, was paid. It is *answered*, Not competent, *hoc loco*, to delay the pursuer in his legal diligence, which is as summar as a comprising, and whereby he may be frustrate by their adjudications in the mean time; but he was content that that exception should be declared to be competent in all competitions, or other process upon adjudications, or infestments to follow thereupon; whereby the other party could sustain no prejudice. The Commissioners repelled the defence, in respect of the reply, and declared as aforesaid.

Brown, Clerk.

Eodem die.

A L E X A N D E R F O R R E S T E R contra *L E S I E N S*.

ALEXANDER FORRESTER pursues Lesiens his goodfather for payment of his tocher, contained in a minute of contract of marriage. It was *alledged* for the defender, That that minute was only subscribed by a notary, and so was null. *2do*, That it was imperfect, and behoved first to be extended; and that it contained no provision to the wife. *3tio*, That the husband had put away his wife, who concurred with the father, and was willing to aliment her upon this tocher. It was *answered* for the pursuer, To the *first*, Albeit there was but one notary, yet the writ was valid; seeing the marriage followed. To the *second*, It was no way relevant; and though there was no provision to the wife, yet she had her provision in law. And to the *third*, *Non relevat*, to exclude payment of the tocher; but if the wife pursue for aliment, she shall have an answer. The Commissioners repelled the defence, in respect of the reply.

January 9. 1658.

S E L R I G contra the Earl of *R O X B U R G H*.

SELRIG pursues the Earl of Roxburgh for 22,000 gilders, contained in the Earl's bond in *anno* 1652, and the Earl's declaration, upon his oath, that he should never make opposition to the payment thereof. It was *answered* for the Earl, That the pursuer was soliciter for the Earl's regiment in Holland, and taking opportunity of the Earl being in Holland in *anno* 1652, when, upon occasion of the war with England, the Earl's regiment was taken from him, and he in hazard to be made prisoner, this pursuer presented to him an accompt, containing most exorbitant and unlawful annual, for which he was

was necessitate to give this bond and declaration, and durst not question the same; but he hath now reduction and improbation depending thereof, which is prejudicial. *2do*, By the bond itself, the Earl's treatments and orders for his pay are hypothecate to the pursuer as his soliciter for this sum, by virtue whereof the defender offers him to prove, that the pursuer is paid by the States of Holland, and craves, that the said treatments may be produced, and compt and reckoning thereupon. It is *answered* for the pursuer, No such reduction or improbation produced. *2do*, For the payment, it is only relevant *scripto vel juramento*. *3tio*, It is not competent, because the declaration is never to oppose the payment of the sums. It was *answered* for the defender, That the declaration cannot be respected, because it is but the attest of a notary having but the witnesses. *2do*, Though it were granted, yet it would not exclude payment, since the declaration, by the hypothecation and moneys received from the States of Holland. It was *answered* for the pursuer, That he offered him to prove, that the declaration was probation according the custom of Holland, where it was done. The Commissioners found the defence relevant, and appointed compt and reckoning, and also found the alledgences relevant for the pursuer, that the declaration was probation in Holland.

Dounie, Clerk.

Eodem die.

WILLIAM MILLER *contra* JAMES STEVEN.

WILLIAM MILLER pursues James Steven for payment of his damages, being imprisoned in *anno* 1651 in the prison of Burntisland by this defender, or upon his instigation, who took him as a spy, and publicly defamed him as a traitor; and offered to prove the same, whereupon he was incarcerated six weeks, and was assoilzied. It was *answered* for the defender, That he was then captain of that prison, and that the pursuer came from an English quarter, whereupon it was his duty to present him to the commander of the garrison, and to report what he heard of him. It was *answered* for the pursuer, That he opposed the libel, wherein he libelled, that not only he presented and reported, but offered to prove him a traitor. The Commissioners, being divided in their opinions, and fearing the preparative of such processes in time of war, recommended to the parties to agree.

Baljour, Clerk.

Eodem die.

ROBERT CRAWFOORD *contra* ANNABLE WALLACE.

ROBERT CRAWFOORD, having obtained decret before the commissary of Air, against Annable Wallace, as vitious intromitter with her husband's goods, for payment of 200 merks due by him; she suspended, and raised reduction upon this reason, That albeit the decret bear compearance, yet there is nothing of debate, but only the libel denied; and that the procurator had declared under his hand, that he did not compear, and had no warrant; and that such compearances ought not to be respected in inferior courts, unless a warrant had been produced; and therefore, she ought to be reponed to her unquestionable defence, which is instantly verified, *viz.* that there was an executor confirmed before the pursuit. It was *answered* for the pursuer, That he opposes his decret's bearing compearance and probation of intromission with goods for 500 merks, which being a judicial public

public deed, by a clerk of court, cannot be taken away by a procurator's declaration, who was ordinary procurator for the defender in thir causes; and therefore the decret bearing compearing, this defence was competent and omitted, and should not now be received, especially seeing the executor was the defender's son, and is dead, and has no means. The Commissioners repelled the defence *hoc loco*, in respect of the confession of the clerk, that the principal inhibition was produced.

Douny, Clerk.

Eodem die.

Mr NICOLSON *contra* GEORGE BALFOUR.

MR NICOLSON pursues a declarator of property and right of common-ty of Biglymuir, against George Balfour, as having molested him in possession thereof: In which — Mowbray compeared for his interest, as having the like process upon his infeftment for declaring his right of common-ty of the said muir; likeas the said George Balfour had also the like process. It was *alledged* for the said Balfour and Mowbray, That seeing the matter resolved in mutual molestations and question of the right and possession of the common-ty of the name of right there, that therefore it ought to be remitted to the sheriff of the shire, to cognosce their possessions by an inquest. It was *answered* for the pursuer, That he ought to have a time to prove his libel by witnesses; and for the other processes, they should have an answer when they were inrolled, and called; and as for Balfour's process, it was not yet seen nor produced; and as for Mowbray's, both the infeftments whereupon he propones are null by exception, the one being an infeftment and not confirmed, the other proceeding upon a charter wanting date and witnesses, and so null by an act of parliament. It was *answered*, That albeit the other processes were not called, yet it was free for them to compear for their interest, as if it were called; and that Balfour being called might propone upon his right by way of exception: As for the *alledged* nullities in Mowbray's right, it was *answered*, That this being a possessory judgment, his infeftment and right could not be taken away by exception. The Commissioners granted commission to the sheriff to cognosce all the three parties possession by an inquest, and to report.

January 12. 1658.

WILLIAM MILLER *contra* JAMES SEATON.

WILLIAM MILLER pursues James Seaton. *Alledged*, in the year 1651, he detained him as a traitor, and craved his damages; and this being upon the ninth of this instant, recommended to be agreed, because of the preparative. Seton having absolutely refused to give any thing for the pursuer's damages, the libel was sustained, but reserving modification after probation of the maliciousness of the defamation, and his loss.

Balfour, Clerk.

Eodem die.

Lady MINTO *contra* Sir LUDOWICK STEWART.

THE Lady Minto and her daughters, pursues Sir Ludowick Stewart younger of Minto, as having got a disposition of his father's whole estate, and

and so being to succeed him by a lucrative title, after the contract of marriage in favours of his Lady and his daughters, to warrant to the Lady her life-land, wherein she is infefted, and to infeft the daughters of the marriage for their portions contained in the contract. It was *alleged* for the defender, No process for warranting the Lady's infeftment, because there is no distress shewn. *2do*, Because the Lady hath yet no right of infeftment, her husband being living. *3tio*, As to the daughters, No process, because the provision in the contract is conditional in case there be no heirs-male of the marriage, that then there should be paid to the daughters such a sum after their father's death: *Ia est*, their father is yet living, and their mother a young woman, and so may have heirs-male; so that the provision, being both conditional and to a day, neither of these can: It is absurd to crave implement thereof. And *lastly*, It is an absurd novelty to crave implement of any part of the contract against the defender as lucrative successor to his father; and so to represent his person while he yet lives. It was *answered* for the pursuer, *imo*, Shewed a distress, *viz.* An infeftment before her infeftment to one Woodrow, which unquestionably would exclude her; and to all the rest the singularity of the cause was, whereby the defender got from his father a disposition of lands worth L. 1000 by year, and 50,000 of burden, and hath almost sold and spent all, *et vergit ad inopiam*; and if they got no decreet against him, and security, the conditional obligations which are hereafter to take effect, will hereafter become useless by his poverty; and therefore they craved sentence only for security, not to take effect, while the condition and time be existant. The Commissioners, in respect of the strangeness and novelty of the cause, and that the pursuer had also reduction depending upon an inhibition against Sir Walter the contractor, superseded to give answer, and ordained them first to insist in their reduction.

January 13. 1658.

JAMES CHRISTY contra ISOBEL WHENTHRY.

JAMES, as assignee constitute by Gibson, heir to umquhile George Gibson, pursues Isobel Whenthy for exhibition and delivery of all writs contained in favours of George Gibson. Several bonds were exhibited, and the dispute is about the delivery. It is *alleged* for the defender, That the bonds ought to be delivered to her as executrix to George Gibson, having confirmed the same. It is *answered* for Christy, That he ought to have delivery of the heritable bonds, *viz.* a bond of L. 2300, granted by the Earl of Seaforth in December 1641, bearing annualrent; which, although it be after the act of parliament 16th November 1641, declaring such bonds to be moveable, yet it is before publication of the said act, till which, it had not the force of the law, till forty days after the publication at the market-cross of Edinburgh, conform to the late act of parliament 1581. *2do*, Craves delivery of three bonds granted by Pinkerton to the said George, which became heritable by a bond of ratification thereof, whereby Pinkerton dispones his whole moveables, acquired, or to be acquired, pertaining, or that may pertain to him, with obligations to grant charters for infeftment, redeemable upon payment of these sums. *3tio*, Craves delivery of a bond granted for 5000 merks by the said Earl of Seaforth; which, albeit it be after the act of parliament 1641, yet, by its tenor, is heritable, the sum being payable to George Gibson and his spouse, and the longest liver of them, and their heirs, which failing, his heirs. It is *answered* for the

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defender,

defender, to the *first*, Oppones the act of parliament 1641, expressly bearing all bonds made thereafter, bearing only the clause of annualrent, to be moveable; and so not after the publication, especially seeing the act acknowledges it a compleat custom to esteem these bonds so heritable, as to exclude the other nearest of kin; and for the act 1581, it can only be understood of mandative or prohibitive acts, but not of declarative acts, bearing expresse declaration of all bonds made after the date thereof, whereby the parliaments minds are clear: And especially the bond being granted by a member of parliament to Richard Guthrie writer to the signet, who cannot be presumed to have been ignorant of such an eminent act passed in parliament a month before. *2do*, As to Pinkerton's bonds, the ratification and dispositions cannot make them heritable, because there is no infeftment of annualrent therein, either in general or particular, but is in effect a *bonorum*, disposing both goods, sums and lands: And if the pursuer will condescend and prove that any infeftment could have followed thereupon, of any lands belonging to Pinkerton, they would find it relevant. To the *third*, It was *answered* for the executrix, That she opposed the act of parliament 1641, which declares no bonds to be heritable, by expressing that the sums are payable to the creditor, and the heirs, unless either their executors be excluded, or that there be a clause of infeftment, neither of which is in this bond; but it is only conceived in this tenor, That the wife may have her liferent. The Commissioners found the three bonds granted by Pinkerton became heritable by the supervenient ratification and disposition of land and annualrent, and found the two bonds granted by the Earl of Seaforth to be moveable.

Brown, Clerk.

Eodem die.

Master of *GRAY* contra *JANET* and *JEAN GRAYS*.

THE Master of Gray obtained decret, as executor to his father, against Janet and Jean, as executrix and intromissatrix with the goods of the father, for L. 400 due by them to Sir William Gray. The said Grays, having raised suspension and reduction of this decret, on this reason, That, albeit the decret bore compearance by David Frazer and Mr John Anderson, Frazer, who was only employed, is ready to declare upon oath, that he never saw the same; and likewise Mr John Anderson, he had no warrant to compear, and yet he compeared and proponed a peremptor of payment. But after litifcontestation before the decret, the suspenders gave in a supplication, shewing that in answer to the defence, and craving to be reponed, and producing a confirmation, whereby the suspenders were become executors creditors to their father for sums far above the inventory; yet that supplication was refused in that state of the process. After litifcontestation made, the only consideration of that could be, that the act of litifcontestation behoved to be taken away, not by supplication, but by reduction, and they ought to have used reduction both of it and the decret. The Commissioners repelled the reason, and found the letters orderly proceeded.

January 14. 1658.

JOHN UDNEY contra *KENNETH M'KENZIE*.

JOHN UDNEY, as assignee constitute by umquhile M'Kenzie of Strakhaven to the tack-duty of certain lands liferented by Dame Margaret M'Leod his spouse, whereunto Strakhaven had right *jure mariti*, due by contract with
Kenneth

Kenneth M'Kenzie, did thereupon charge Kenneth upon the tack, and obtained a decret of suspension; which is now suspended upon this reason, That it is clear by the decret of suspension, that the suspension was only produced to stop the protestation; and therefore, there is not one word of an answer to the reasons, not so much as opposing the tack thereto. And therefore the letters are found orderly proceeded for the whole tack-duty, and for the annualrent thereof, and a penalty of 700 merks. The said M'Kenzie farther *alledged*, That Udney's assignation is vitiate *in substantia-libus*, viz. where it assigns the 2000 merks due for Martinmas 1645, and that it is fraudulent, being betwixt his goodfather and him, without an onerous cause, to the prejudice of lawful creditors, and especially of the lady. And it is offered to be proven, by this charger's oath, that to his certain knowledge, there was much above that sum due by her umquhile husband to her for her conjunct-fee. And now he having paid her, and obtained discharges in that same condition, as if he had got assignation from her, and so ought to have retention and compensation in his own hand, and cannot be excluded by this fraudulent assignation. The charger opposes his assignation, containing a decret *in foro contradictorio*. The Commissioners repelled the reason of suspension, but modified the penalty of 700 merks from 600 merks to 100 merks.

Douny, Clerk.

Eodem die.

WALTER PATENS contra the Laird of ALDIE.

WALTER PATENS, as assignee constitute by the Lord Cowpar, having charged the Laird of Aldie, for the teind-duties of the lands of Aldie, from 1640 to 1653. He suspends, and craves allowance of the public burdens of cess and maintenance, quartering of horse and foot, conform to the receipts produced. It is *answered* for the charger, That he is content to allow cess and maintenance, but teind-duty cannot be liable to outreck of horse and foot; and as to quarterings, the possessor was liable therefor, and the teinds have not houses. The Commissioners found the teinds liable for cess and maintenance, and for total quarterings, and for the outrecking of horse and foot, only according to the custom of the shire.

Eodem die.

ISOBEL SANDYLANDS contra ANDREW DUFF.

ISOBEL SANDYLANDS, having obtained decret for mails and duties of some tenants in Leith against umquhile Isobel Duff, she suspended and found Andrew Duff cautioner. The suspender being dead, the charger hath raised a wakening against the said Duff as heir to the said Isobel, and against the cautioner in the suspension. It is *answered*, That the defender repeats the reason of suspension by way of defence, viz. That albeit Mr John Rutherford be marked compearing, it is evident, by the auditor's account and report, that there was no defence given in, but only the libel referred to the pursuer's probation; and yet it is manifest, That the pursuer's procurators produced a tack granted by Mr John Sandylands to umquhile Thomas Sandylands, and the said umquhile Isobel Duff, during their lifetimes; by virtue of the which tack, the said Isobel was in possession much above seven years; and therefore, in a possessory judgment, could not have been decerned for any farther than the tack-duty. It is *answered* for the pursuer, That she

she opposes the decreet. *2do*, No respect to the tack, because Mr John Sandylands's right, the granter thereof, is reduced. It is *answered* for the defender, That the decreet of reduction is only in 1653, and could not prejudice Isobel Duff, who was not called thereto, and albeit she had been called, the reduction could not have been drawn back to make her pay the mails and duties before decreet or litiscontestation therein. The Commissioners found the defence proponed upon the tack relevant to free the defender from any farther than the tack-duties for all years before litiscontestation in the reduction against Mr John Sandylands, and for all years thereafter, paid to Mr John, *bona fide*, before the intending of the cause against Isobel Duff.

Dounie, Clerk.

January 15. 1658.

WILLIAM PATERSON and JOHN ANDERSON
contra THOMAS and WALTER WELSHES.

THOMAS and Walter Welshes, having granted a bond of 3000 merks blank in the creditor's name to John Chisholm, payable at three Lambaffes, William Paterfon and John Anderson, did, in June 1657, arrest in the hands of Thomas and Walter Welshes, all sums due by them to John Chisholm. James Welsh is decerned to make forthcoming L. 90 upon his own confession, that he and his two brothers were addebtet to the said John Chisholm in 3000 merks, payable at the said three Lambaffes by bond. Thomas Welsh is decerned to make forthcoming L. 40 upon the same confession. The said Welshes being thereafter charged at the instance of Robert Hunter, whose name was filled up in the blank bond: They suspended upon triple poinding, and call Robert Hunter, William Anderson and Thomas Paterfon, and *alledged*, They can be liable only in once payment; because it is clear by the disposition, and by the bond, that both is for one cause. It is *alledged* for the arresters, That they ought to be answered, *first*, Because the oath bears not that the bond was blank, but that the deponents were debtors to John Chisholm, and so they are liable to both. *2do*, Though there were no other bond, yet they must be preferred, having long before the intimation of the filling thereof with Robert Hunter's name in the blank, arrested and recovered decreet: And the blank-bond can be no better than if it had been a bond granted to John Chisholm, and assigned by him to Robert Hunter. It is *answered* for Robert Hunter, That the filling up of his name can only be proven by his oath; and if they will say, that it was filled up after the arrestment, *relevant*; but if before, *non relevant*, because by the law there is no intimation required of the blank-bond. The Commissioners repelled the reason of preference proponed for the arresters, that their arrestment was prior to any intimation or charge, unless they will alledge that it was before delivery, and filling up of the blank-bond.

Dounie, Clerk.

Eodem die.

THOMAS SETON *contra* ADAM MUSHAT.

THOMAS SETON pursuing a reduction of a decreet-arbitral between him and Adam Mushet pronounced by William Purves as arbiter, insists for certification against the compt-books, contained in the decreet and discharge, and charge of the parties. It is *answered*, No certification, because, after the decreet-arbitral, no regard was had of these compt-books, but they might

might have been burnt. It is *answered* for the pursuer, That he hath libelled a reason against these compt-books, *viz.* That albeit, by the decreet-arbitral, he is found debtor in L. 8000, yet after just calculation of the said accompts, and instructions thereof, Musket will be debtor to him in L. 600. The Commissioners granted certification against the compt-books mentioned in the decreet-arbitral, but not for depositions of witnesses or deputes, but ordained the arbiter and pursuer to make faith anent the having thereof.

Balfour, Clerk.

Eodem die.

Lady WEDDERBURN *contra* MUSEROY.

THE Lady Wedderburn, by a minute of contract between her and William Musero, having set to him certain lands for five years, his entry to have been at Whitsunday 1657, pursues for fulfilling of the tack, payment of the tack-duty, and L. 1000 of penalty for not entering and possessing. It is *alleged* for the defender, No process, because this is a minute not extended. *2do*, Subscribed but by one notary, and therefore, before the subscription of another notary, he might refile. *3tio*, *Absolutor*, Because it is offered to be proven, that the Lady herself, or at least her tenants having right from her and her husband, possessed the lands. It is *answered* for the pursuer, That she opposes the minute, being obligatory, and needs no extrusion. *2do*, She offers her to prove, that the defender gave command to the notary, and therefore could not refile. *3tio*, Albeit the land had been possessed, that they might not be altogether waste, yet the defender must enter so soon as they shall be waste or made void, and pay the penalty. The Commissioners found the reasons relevant, *viz.* That the suspender having only subscribed but by one notary, albeit he grants he gave command, yet it was not a perfect writ without two notaries, conform to the act of parliament; and that thir lands are possessed by the charger or her tenants.

Brown, Clerk,

Eodem die.

JAMES TURNBULL *contra* Lord CRANSTON.

JAMES TURNBULL, being infest in the lands of Wauchop, as heir to Thomas Turnbull his uncle, pursuers Lord Cranston for production and improbation of all rights competent to him for the said lands, and insists for certification against the alleged decreet or doom of forfeiture, in the year 1604, by the Earl of Dunbar, then Lieutenant and Justiciary of the borders: Whereby the said umquhile Thomas Turnbull is alleged to have been forfeit; and, upon which forfeiture, the Lord Cranston's predecessors got a gift and presentation from the King for obtaining himself infest in these lands, which were holden of the Earl of Angus. It was *alleged* for the defender, No certification against that doom of forfeiture; *first* there are sufficient adminicles produced to obstruct the truth of that doom of forfeiture, and to impede certification against it as false, *viz.* the criminal letters raised against Thomas Turnbull, for treasonable crimes, *viz.* raising of fire, murder, and for theft, being a landed man, the declaring him fugitive; and likewise the charter granted by the Earl of Angus, particularly deducing the forfeiture, the gift, and presentation, and one of the pre-

cepts out of the chancery, for charging the Earl, and therefore *positis extremis presumitur media*; especially it being notour and not denied, that Thomas Turnbull was hanged, which could not legally be, but upon a treasonable crime; for in other capital crimes, all gentlemen are beheaded. 2do, No certification, because the foresaid doom of forfeiture is a decreet of the King's court, which is supreme, and out of which no person is obliged to produce any writ, but only the clerk of that court; and if any will improve the same, they must purchase the writ to be produced, or the clerk to produce the record; and therefore no certification was granted against writs registrate in the books of session, council, or justice-general. It was *answered* for the pursuer, That the alledgeance ought to be repelled, *first*, Because the criminal libel produced is not the libel whereupon the doom of forfeiture proceeded, nor before the court; but it is a libel in 1606, before the Justice-general, in which umquhile Thomas Turnbull is only called, and declared fugitive, as accessory to the crime libelled: And it is instructed that the principal parties called were assoilzied; and therefore these can be no adminicles against a party only accessory: And as to the principal out of the chancery, that is given of course, *periculo petentis*, and will proceed as well upon a false doom as upon a true: And as for the Earl of Angus's charter, it is no adminicle; because it is acknowledged for great sums of money, which would never have been given, if there had been a real warrantable forfeiture, and gift. As to the other, the books of the Lieutenant of the border have not that privilege to exeem a party from production as the session, because it is not a fixed judicatory, but only a commission; and thererore no such books known, out of which to search and extract the same, neither a clerk to call; so that all remedy of improving a false doom of forfeiture, though it concern life and estate, should be taken away. The defender repeated his former alledgeance; and withal that he and his predecessors had been 49 years in possession, by virtue of an infeftment following upon that doom; and therefore a criminal libel, though it was not before the same Judge, yet it was the same judicatory; and it was ordinary that where persons living in the Border were pursued criminally, *via ordinaria*, before the Justice, and were fugitive, they might still be pursued before the Lieutenant of the Borders, having his commission to that effect; and though the Earl of Angus's charter bears onerous causes, it is known that in that time, it was not safe to get entred by such a great superior as the Earl of Angus; and therefore though one had been given him, it cannot infer there was no right. The Commissioners sustained the defence, and refused certification against the doom of forfeiture.

January 16. 1658.

Mr HUGH TIRY of RYLA *contra* WILLIAM DUNLOP.

MR Hugh Tiry of Ryla, having obtained designation of four acres of the Vicar of Ryla's lands, and pasturages thereto belonging, charges William Dunlop to enter him in possession to the said pasturage; and condescends that the said Vicar's land has belonging thereto, sixteen souns in the Canonmuir of Inkyla; and craves a proportionable part thereof to his part of the Vicar's lands designed, conform to the act of parliament 1593. William Dunlop suspends upon this reason, That, by the act of parliament 1649, the quantity of horse and cows grafs accressing to the minister is determined; and he is content to grant him the like number. It is *answered* for the charger, That that act does not take away the benefit of the former act, that designation of glebes cannot be with common pasturage, feal and divot. The Commissioners repelled the reason, and granted commission to estimate the

the proportion of the founs pertaining to the Vicar's lands of Likla, effeiring to the four acres designed.

Balfour, Clerk.

January 19. 1658.

JOSEPH MOWAT *contra* JOSEPH LEARMONT.

JOSEPH MOWAT pursues a reduction against Joseph Learmont of an alienation, granted to the defender, and infestment of certain lands following thereupon, granted by James Douglas of Stonypeith, after he was inhibited by the pursuer. It is *answered* for the defender, *Absolvitor*, because the inhibition is null, *imo*, In so far as it is done at the market-cross of Edinburgh; and the land lying within the regularity of Dalkeith. *2do*, Because John Douglass at the time of the inhibition was dwelling at Glenbervy, whereof the head-burgh is Stonehive, and the same is not executed there. It is *answered* for the pursuer, That he opposes his inhibition standing, which cannot be taken away without reduction upon nullity, consisting *in facto*, which cannot be instantly verified. *2do*, Though it were competent, all regalities are now taken away, as being a distinct jurisdiction from the royalties. It is *answered* for the defender, That his defence is most competent in a reduction, that regalities are not taken away as to the place of publication of inhibition, for the accommodation of the people. The Commissioners repelled the defences *hoc loco*; and reserving reduction upon his alledged nullity, as accords.

Downy, Clerk.

Eodem die.

JOHN M'LURG *contra* MARGARET COCKBURNE.

THE said John pursues the said Margaret and her husband for L. 200, for market-ware, taken off by her *in anno* 1656. It is *answered* for the defender, *Absolvitor*, because she was then in her father's family; and so it must be presumed, That the ware was given out, not upon her own, but her father's trust; especially seeing her father has entered in payment, and that there is a hat in the accompt, which could not be for the defender's proper use; and that it will be of dangerous consequence, if Gentlewomen and their husbands may be pursued for their bridal-cloaths, and all merchant-ware taken up by them. It is *answered* for the pursuer, That the alledgeance ought to be repelled, as being founded upon any such presumption; unless it were offered to be proven by the pursuer's oath, that it was upon her father's trust, or that it was by command and direction to the pursuer: And albeit payment hath been taken from her father, or that her father hath been obliged to relieve her, and pay the accompt; yet that frees not her, upon whom there was no constraint to contract; and the inconveniencies will be found the greater, that the merchant should lose payment, seeing a father would not be obliged unless he had given warrant to the merchant; and so both would be free. The Commissioners repelled the defence as it is proponed upon the presumption, and sustained the libel.

Balfour, Clerk.

January

January 20. 1658.

G L A S S *contra* T R O Y.

GLASS having obtained decret before the Commissaries of Fife against Troy, in which a term being assigned to Troy to prove an exception, he failed, and the term was circumduced; Troy suspends and raises reduction on this reason, That the Commissaries had done him wrong, in assigning him so short a time, and that he had used all diligence, by coming to Edinburgh where his writs were and returning; but before his return the term was circumduced: And now he produceth the writs that proves his exception, and craves to be reponed against the certification. It was *answered* for the charger, That he opposed the decret *in foro contradictorio*, wherein a time was taken to prove; and he having failed, and certification granted, that the certification be loosed, that is a dangerous preparative, and against the course of the Law. The Commissioners, before answer, ordained the suspender's oath to be taken upon the diligence done by him.

*Eodem die.*D A U L I N G *contra* J A N E T M U D I E.

DAULING, as executor to his father, having pursued Janet Mudie as heir and executor to umquhile Thomas Mudie her father, before the Commissaries of Edinburgh, upon this ground, That Thomas had granted commission to his father to bring home two hundred pounds worth of timber; and that he had bought and shipped the same, both himself and it was lost; and therefore she ought to pay the price. In which process, the Commissaries sustained the commission to be proven by witnesses, whereupon she was decerned; and now, she having suspended and raised reduction, she *alleges*, That the Commissaries decret was unjust and illegal, sustaining a commission in writ to be proven by witnesses. It was *answered* for the charger, That such a calamitous case as this, where his father and the commission were lost at sea, witnesses might be received, as well as they might be in the probation of a tenor; and that, for adminicles, he produced a bill of exchange drawn by the defunct upon umquhile Thomas Mudie for this L. 200. It was *answered* for the suspender, That this *allegeance* could be no warrant for the Commissaries who were not competent to probation of tenors. *2do*, That albeit it had been dispute here, probation of tenor was never received by way of reply. *3tio*, If this were the probation of a tenor, the adminicles were not relevant, seeing the bill of exchange was refused by Thomas Mudie, and protested; and if witnesses who knew the commission were examined, they might depone the condition of the commission, and that the hazard was upon the merchant. The Commissioners turned the decret into a libel, and found the tenor could not be proven by reply.

*Eodem die.*G E O R G E M O R I S O N *contra* E L S I C K.

A Removing. *Alleged*, He cannot remove, because the title was a feifin proceeding on a comprising led by Morison against his father, who was but a naked liferenter. *Replied*, He cannot be heard, because he being successor *titulo lucrativo, post contractum debitum*, is, in law, liable in payment of

of the debt, and so is not the person that can quarrel his apprising. This was contentiously disputed; yet the Lords assoilzied Elsie from the removing, reserving action to the pursuer to convene him as successor, &c. or *super quovis alio medio*.

A&. Nisbet.

Alt. Gilmer.



Eodem die.

TURNBULL contra Lord CRANSTON.

IN the said improbation, wherein was called for a doom of forfeiture, given against the pursuer's granduncle, *ut supra*, and whereon the Lord Cranston was presented by the King to my Lord Angus superior of these forfeit lands, who entered Cranston as his vassal; and by virtue thereof, the Lord Cranston bruiks these lands, of old belonging to the pursuer's uncle, to whom he is served heir. In the production it was much disputed, if it was needful to produce the said doom, *post tanti temporis intervallum*, as 48 years, and my Lord Cranston's peaceable and uninterrupted possession all that time. *Alledged*, It behoved to be produced, because it is false, there having never been such a doom of forfeiture in the world against this Turnbull, and being the only title by which Cranston bruiks the lands, he behoved either to produce the same, or else certification must pass. *Replied*, It needs not be produced, because the writs produced proves he was cited as a thief before the Justices, and that he found caution to answer; and offered to prove, that he was hanged accordingly; and by the law, he was a traitor, theft in landed-men being treason, and so proving, he was criminally arraigned, and that he was hanged, *presumitur*, that he was forfeit, *quia postis extremis ponitur medium*. The Judges assoilzied from the certification craved against the doom of forfeiture; and that there was no need to produce the same now, after so long a time, and Cranston bruiking the lands 40 years and above. This was contentiously disputed *in presentia*.

A&. Maxwell.

Alt. Gilmer.

January 21. 1658.

Dame ELISABETH GORDON contra ——— GREGORY.

DAME Elisabeth Gordon, Lady Frendraught, being by minute of her contract of marriage, provided to four chalders of victual of the lands of Kinnardy, with this express clause, That if her husband should not be able to live peaceably with her, and entertain her, that she should have right to these lands, and to uplift the mails and duties thereof, and intent action thereof without his concurrence, even during the marriage; which contract, and clause foresaid, was extended by a contract of marriage, declaring, that, if by captions, apprisings or civil distress, her husband should not be able to live peaceably with her, and entertain her, that she should, with his concurrence, have right to these lands for entertainment of her and her family; whereupon she was infest; and thereafter, her son granted a disposition of the lands of Kinnardy in lieu and excambion of the lands of Knowbordy, with the former clause. And now the Lady's husband being in distress by captions, and his lands apprised, particularly Kinnardy, the Lady pursues a declarator against ——— Gregory the compriser, to hear and see it found and declared, That by virtue of her said infestment, and clause foresaid contained therein, in her contract of marriage, that the condition is now extant by her husband's distress; and she ought to have

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access

access to the said lands without her husband's concurrence; and the defender, appriser, and others, to desist from troubling her therein. It was *alleged* for the defender, *1mo*, No process, because the Lady's *jus mariti* that was by this declarator to be taken away, was not called. It was *answered*, That he needed not be called, being the Lady's author in thir lands, and in that condition. *2do*, Compearance and concurrence was made for him. It was *answered* for the defender, That he could not compear in prejudice of his creditors. The Commissioners *repelled* the defence, in respect of the reply, and found process. It was *further alleged* for the defenders, *Absolutor*, because they had apprised the lands *cum omni jure* for the husband, and were thereupon infest, and in possession, and their infestments could not be taken away thus summarily. *3tio*, The clause being in lieu and excambion for the like in her former infestment, could not be sustained, unless it were alleged and shown, that not only in her contract, but former infestment exchanged, that this clause was contained, and, if need be, it was offered to be proven, that her former infestment was simply without that clause, which was a passing from that clause. *4to*, That the clause, as it now stands, was *donatio inter virum et uxorem*, and so null, *nisi morte confirmatur*, in respect the contract was after the marriage; and albeit there had been no contract before, it might be sustained as *propter* though *post nuptias*; yet there being a contract before the marriage, wherein that clause was not contained as after, nor could not be extended to legal distress, but only to criminal trouble, whereby the husband behoved to be latent. *5to*, That such clauses are unlawful and void, as being against the nature of marriage, and taking away *jus mariti*, and that participation of condition betwixt man and wife is the way to open a door to all fraud, that none can contract with a married man. *6to*, The condition lying distressed by captions and apprisings, the defender offers to purge the same, in so far as to give the husband a peaceable cohabitation. And *lastly*, By the law, all rights moveable, that is, or can be in the option of the wife, doth, *ipso jure mariti*, recur to the husband; and, *jure mariti*, although the husband should renounce, yet whatsoever moveable thing should accres to the wife thereby, returns back to him again. It is *answered* for the pursuer, in the *first* place, That this is not a possessory judgment, but a declarator of a right. To the *second*, That albeit that disposition was after the defender's debt; yet, that it was for implement and satisfaction of the contract of marriage, and former infestment of a bond granted by his son before the defender's debt. To the *third*, That though this clause had been omitted in the former infestment; yet it is no passing therefrom, but she might have compelled the husband to renew the infestment conform to the contract. To the *fourth*, That the contract was only an extension of the minute, and clearing of the mind of the parties in the first clause. To the *fifth*, That *jus mariti* being introduced in favour of the husband, may be renounced, and is no essential of marriage. To the *sixth*, The offer is not relevant, unless the husband were not only rendered free for cohabitation; but also conform to the clause, That, by these distresses, the husband was not incapacitate to entertain and aliment his wife, which is the only sense and effect of the clause. To the *last*, That *jus mariti* being renounced, there is no reason wherefore it should return, but especially seeing the law hath exceptions from the husband's community and power *jure mariti*, not only in his wife's clothes and ornaments, but also in any aliment constitute to her, either by himself or any other, which hath been oft decided, can neither be arrested nor affected by his debt; and by the provision it is clear, that this is an aliment. It was *answered* for the defender, That he opposed his defence, and repeated the decision betwixt the

the Lady Carberry and the creditors of her husband, where, by her reservation of her liferent, bearing an express renunciation of her husband's *jus mariti*, was found to return to her husband, and so to his creditors. It was *answered* for the pursuer, That there was a greater difference here from that clause; for the reservation was not only as an aliment, in case of necessity, but a full power to dispose, without her husband *simpliciter*; and opposed the late practice in the case of Sir William Callendar's Lady, who was preferred to his creditors in a small sum assigned by him to her, as being in effect for aliment. It was *answered* for the defender, That this provision was greater than the Lady Carberry's, and that a husband might secure his whole estate to his wife, and call it aliment, and so defraud his creditors; and that an aliment was to be considered, what was truly so, and not what was designed: It was *answered* for the pursuer, That, at the time this aliment was constitute, the constituent being free, might determine the quantity thereof at his pleasure; and that it was but a small one in respect of the estate he then had, and the quality of the Lady, being the Earl of Sutherland's sister; and that she has now a numerous family. It was *answered* for the defender, That an aliment behoved to be considered as in the clause of the condition of the husband's distress, and not according to his plentiful fortune, or his quality. The Commissioners found that member of the defence relevant, that this provision returned to the husband *jure mariti*, howsoever it was provided, except in the case of aliment; and therefore repelled the said relevant reason, in respect of the reply, and sustained the infestment, in so far as a true and competent aliment; and in respect of the Lady's greater family now, modified the same from forty chalders of victual to twenty-five, and declared the remainder of the land free during her husband's life, but prejudice of her whole liferent thereafter.

Donnie, Clerk.

Eodem die.

J O H N ——— contra J O H N L Y O N.

J O H N ——— pursues John Lyon for a spuilzie of certain lands or corns. It was *alleged* for the defender, *Absovit* from the spuilzie, because he meddled by command of his father, to whom these corns were sold by the pursuer, who received a bond therefor. It was *answered* for the pursuer, That the alledgeance is not relevant, unless there had been delivery or lawful possession of the corns; but it is like that they were violently taken away. It is *answered* for the defender, That his defence stands relevant, seeing it is not the custom to make any solemnity of delivery; and the said bargain cannot but be relevant to strict to the intromission; in which case the pursuer cannot seek restitution both of the corn, and also keep the bond. The Commissioners restricted the libel to wrongous intromission, and allowed the defender to propone his defence; and that the pursuer might either quit the bond or the corns.

Brown, Clerk.

Eodem die.

J A R D E N contra K I N N A D I E of H A L L I S.

J A R D E N pursues Kinnadie of Hallis for a spuilzie of certain cattle. It was *alleged* for the defenders, *Absovit*, because they offered them to prove lawfully pointed. It was *answered* for the pursuer, That the alledgeance

geance ought to be repelled, because the pointing was not against the pursuer, and it is offered to be proven that they were then this pursuer's proper goods, and that at the time of the point, he to whom they were put the time of the grasing made faith that they were not the goods of the party pointed, but this pursuer's goods. It was *answered* for the defender, That albeit the goods were this pursuer's, and not the party's pointed, that can only make restitution of wrongous intromission; and the making faith of that person cannot infer a spuilzie; because, by the oath and custom, the privilege of saving goods from pointing, is, from the owner swearing the goods to be his own; and not by the oath of any other party who can hardly know. It was *answered* for the pursuer, That, albeit the owner's oath is ordinarily given, when goods are pointed off his own ground; yet when they are pointed from another who had them in grasing, and cannot always attend them, the grasier hath good interest to preserve them from pointing, and is more free and less suspected than the owner's swearing in his own cause. The Commissioners restricted the libel to wrongous intromission.

Downie, Clerk.

Eodem die.

D A V I D B R A I D I E contra ———.

DAVID BRAIDIE having pursued ——— before the Admiral for some puncheons of wine of his brought home and not delivered. ——— was assolizied; yet thereafter was pursued for the same cause before the Sheriff of Fife; and there having defended himself by the absolvitor, it was *replied*, That he had acknowledged and confessed the wine not delivered after that *absolvitor*, which reply was found relevant, and a day appointed to ——— who compeared not, and was holden as confessed; and having now suspended, he craves to be reponed to his oath, and produceth testificate, that he being a skipper, went out of the country before the time that he was holden as confessed. It was *answered* for the charger, That he could not be reponed, seeing he was in the country after the time was appointed. The Commissioners reponed the defender, especially considering that the Sheriff had sustained a relevant reply of an extrajudicial confession, though it was not pleaded.

Brown, Clerk.

Eodem die.

T R A Q U A I R contra the Earl of M O R T O N.

TRAQUAIR pursues the Earl of Morton, as representing his goodfire, to pay 20,000 merks contained in a contract *in anno* 1630, L. 3000, in 1634, and L. 1000, in a bond 1647, all granted to the pursuer by the defender's goodfire. It was *alleged* for the defender, That the said sums must be presumed to have been paid by pregnant articles, *viz.* That after them the umquhile Earl of Morton sold the barony of Linton to Traquair; and that he sold the barony of Dalkeith to the King, the price whereof was paid to Traquair, then treasurer, and that Morton resigned his office of Sheriff in favours of Traquair; and that by a list of my Lord Morton's, written by one Killfou, a very honest man, these were not mentioned; so that these sums may be presumed to be allowed or detained by Traquair, having need of his money, and yet not pursued till of late, and that the defender produced an exhibition for recovering his goodfire's writs, which is prejudicial, and he being

being a minor, ought to have a time to recover his writs, ere he propone a peremptory. It is *answered* for the pursuer, That an exhibition is not a prejudicial action; but the defender ought to propone a relevant defence of payment, allowance or compensation, for which the pursuer was willing to grant incident, that he might recover the writs; but the defence was no way relevant upon the presumptions alledged, which could not take away the pursuer's writs: And that the presumptions were neither true nor pregnant; for the lands of Linton were bought before these contracts: And as for Dalkeith, the money was paid by the King's receivers; and the surrender of the office of Sheriff imported no sums of money, and it was no way relevant to take away a debt upon alledgeance of other bargains posterior: And as for the list under Kilson's hand, it was an unsubscribed paper of a third payment. It was *answered* for the defender, That he opposed the practice betwixt the Lady Trabroon and the Laird of — where a bond was taken away by a presumption. The Commissioners superseded to give answer to this cause till the 15th of June, and ordained Morton, in the mean time, to insist in his exhibition, with certification.

Dounie, Clerk.

January 22. 1658.

ALISON KELLY *contra* —

ALISON KELLY, having right from the heir of umquhile Margaret Nisbet, pursues a reduction of a disposition of lands belonging to the said Margaret, granted by her *in lecto ægritudinis*. It was *answered* for the defender, *1mo*, No process, because the pursuer of this reduction being the general heir, was not specially served nor infest. *2do*, The pursuer's author, Margaret Nisbet's right was improven, and so, being declared false and feigned, could not be a sufficient title to reduce. It was *answered* for the pursuer, To the *first*, The defence is not relevant, because a reduction must necessarily proceed before the heir-general can be specially served; seeing, by her author's disposition, *in lecto ægritudinis*, she was divested, and the defender's author infest; and so she could be served to Margaret Nisbet, as having died last vest and seised, seeing she was divested. *2do*, The alledgeance proponed ought to be repelled against this defender, because both pursuer and defender's right flowing from Margaret Nisbet, and neither can object against their own author's right, albeit it were improven at the instance of a third party. The Commissioners repelled the defence. It was farther *alledged*, That the reason *super lecto ægritudinis*, was no way relevant as it is libelled, *viz.* That Margaret Nisbet had contracted the disease whereof she died before granting the disposition, and thereby kept the house, and never went to kirk nor market; unless it were *alledged* that through the disease she was either infirmed, or weakened or distempered in her judgment; but albeit she kept the house, yet she might have been as perfect in her judgment as ever; and therefore, as the like was found in a case of a disposition granted by David Grantame in favours of Helen Sim his wife and her daughter, was sustained, though it was granted after his contracting of the disease of which he never went abroad; and as was done in the case of John Kello *contra* the Earl of Home, where the Earl was not only forced to alledge, that he was *in lecto ægritudinis*, but also, that he was not *sani mentis*. *2do*, Albeit, it be a rule in our law, that dispositions of haill rights, cannot be granted in prejudice of the heir *lecto ægritudinis*; yet it hath its own exceptions, and, in respect thereof, hath been very variously decided; as the law of King William, which is the first original thereof, hath the exception of the case

of necessity for maintenance to the deceased person, and likewise, if the disposition be proven to be for onerous causes and interest pure, and so be not a donation; therefore the law of his Majesty expresseth it thus, That gifts shall not be granted *lecto ægritudinis*; and also a moderate provision for children, by parents upon death-bed, albeit it affected the heritage; such dispositions proceeding upon that natural obligation of parents to provide their children, would not be reduceable. 3^{tio}, Whatever might be alledged against the obtainer of the disposition, or his heirs; yet the defender being a singular successor contracting *bona fide* with a person having a real right, without visible nullity, after thirty years time, this cannot be called in question. It was *answered* for the pursuer, That the libel, as it is reasoned, stands yet most relevant according to the accustomed course and stile, and there is no necessity to alledge, that the disponent was weak in his wits or distempered; otherways, whether she was *lecto ægritudinis* or no, that would annul this deed: But the law, upon just grounds, presumes such persons to be weak, and easily deemed to prejudice the heirs by the instigation of those about them; and therefore disallows such dispositions. And as to the case of David Grantame, it was but one, and very ill represented; and there it was proven that the disposition, being of several sheets of paper, was all written with his own hand, and was, for a pious cause, in favours of the kirk-session and his wife, by whom he got all his means. To the *second*, Albeit there be exceptions when the cause is so onerous that it relieves the heir of an equivalent burden to which he would be liable, and therefore excludes him, and he has no detriment; yet the narrative of a disposition bearing sums of money, will never prove such a cause onerous, unless the anterior heritable debts were shewn: For if the disponent should have got real money, and disposed thereof to her husband or friends, yet the disposition would be reduced, as being in prejudice of the heir. To the *third*, That there is here no difference betwixt the first acquirer and a singular successor, whose *bona fides*, or the real right will not save him; but in this *sequitur fidem auctoris*, as in a disposition made by a pupil, minor, furious person, or upon compulsion, would reduce against all singular successors; so it doth in this case. The Commissioners repelled the defences, and found the reasons, as they were reasoned, relevant.

January 23. 1658.

ARCHIBALD JOHNSTON *contra* Mr WILLIAM BANNANTINE.

ARCHIBALD JOHNSTON pursues Mr William Banantine, son to the Laird of Corhouse, for a spuilzie. It was *alledged* for the defender, *Absolutor*, Because he offered him to prove lawfully pointed. It was *replied* for the pursuer, That the defence ought to be repelled, because he offered him to prove, that at the time of the pointing, he compeared and produced a disposition for an onerous cause, and an instrument of delivery of the goods; and that he was truly then in power, and had once recovered them out of the possession of his author, who was pointed, and that he offered then to make faith that they were his own proper goods. It was *duplicated* for the defender, That the reply ought to be repelled, because the decret, whereupon he pointed, was at his instance, as assignee to his father, of the mails and duties of the land upon which the goods were; and therefore, the master of the ground having an hypothecation, delivery thereof by the tenant, or any offer to make forthcoming, that they were another person's, by
their

their disposition, could hinder the poinding; but as he might have stopped the goods, when another had poinded, so he might much more have poinded himself. The Commissioners found the defence and duply relevant.

Dounie, Clerk.

Eodem die.

M I L L *contra* D R Y.

MILL, being infest in an annualrent out of certain houses in Edinburgh, pursued a poinding of the ground against the heritor and possessor: Compearance was made for Dry, who *alleged* no poinding of that part of the tenement possessed by him, till first he were satisfied of the sums expended by him; neither scarcely for the reparation thereof; seeing without that reparation, part of the houses would have been unprofitable. It was *answered* for the pursuer, That this defence would not stop his poinding, but if the defender had expended any thing warrantably and profitably in reparation, he might pursue either him who gave him warrant, or any who should reap the profit, but could not thereby stop the poinding. The Commissioners repelled the defence, and decerned, reserving to the defender his action of reparation, as accords.

Balfour, Clerk.

Eodem die.

Mr JOHN SCOUGAL *contra* HUGH MONTGOMERY
of BRYGEN.

MR Scougal, being infest in a wadset of the lands of Kraidones, first granted by the Laird of Caprington to Robert Halyburton; and having obtained decret against Hutcheson the tenant, for two year's duty last past; he suspended, and compearance is made for Hugh Montgomery of Brygen, who *alleged*, That he ought to be preferred to the mails and duties, because he is heir or apparent heir to umquhile John Montgomery his father, who stood infest in these lands by the Laird of Caprington, long before Halyburton or Scougal's infestment; and, by virtue thereof, was seven years in peaceable possession. It was *answered* for Scougal, That he ought to be preferred, because he offered him to prove, that he and his author Halyburton stands infest in the said lands, and, by virtue thereof, in possession seven years immediately before the year libelled; and therefore, this being a possessory judgment, and he having already obtained decret against this tenant, he could not be excluded by any other prior right and possession before these seven years, until his right were produced. *2dly*, He could not be excluded by Hugh Montgomery, because he was not yet infest, upon which he could not pursue for mails and duties, having no title. It was *answered* for Montgomery, That, in a case of competition which suffers not delay, yet the apparent heir may propone upon his predecessor's right as well as if he were infest; and that Scougal cannot plead against the benefit of a possessory judgment, seeing his father had not only a prior right, but long prior possession. The Commissioners found that Hugh Montgomery had good right to compete upon his father's right, though he was not infest; but found the allegiance for Scougal, that he was in the last possession seven years, relevant against a prior possession.

Brown, Clerk.

Eodem

*Eodem die.*B O R T H W I C K of C R I N K S T O N *contra* W A U C H O P.

BORTHWICK of Crinkston, upon a reversion granted to his grandfire by Gilbert Wauchop for L. 300 above an hundred and twenty years since, and having long ago used an order of redemption against Wauchop of Craigmoor, as apparent heir to the said umquhile Gilbert Wauchop his goodfire, he pursued a declarator of redemption and obtained decret, albeit the order of redemption was used on the Sabbath-day, and that all parties having interest were not cited at the market-cross, conform to the summons of declarator ; and albeit the reversion bears species of gold and money, at such rate, as that the sum (these species being rated now no higher than they were in the reversion), would have been as good as the land ; yet because the whole money was not so tailzied, the lands was declared redeemed, by payment of L. 300, which was the sum in the reversion, present current money, neither in the species nor at the rates mentioned in the reversion, and Wauchop was decerned to renounce and resign all right and possession he had from Borthwick, but prejudice to him of any other right, as accords ; upon which declarator Borthwick, having warned before Whitsunday, pursues a removing. It was *alledged* for Wauchop the defender, No process, because the pursuer was not infest in the lands, *nulla facta nulla terra*. It was *answered* for the pursuer, That, albeit regularly removing cannot be without infestment ; yet it hath its exceptions, *viz.* a tenant or wadsetter redeemed, who took right from any party, cannot controvert their author's right ; and therefore more here, where there is not only a wadset, but a decret decerning the defender to renounce the possession. *2do*, It was *alledged* for the defender, That, albeit he was decerned to renounce the possession, yet it was only such possession as he had from this pursuer or his author ; but he offered him to prove, that he had right to the said lands, and was infest by Cockburn of Newhall, and, by virtue thereof, in possession forty years before the warning, which right must defend him ay and while it be reduced. It was *answered* for the pursuer, That he cannot ascribe his possession from that right of Cockburn of Newhall, seeing the reversion acknowledged his right to have been long before from the pursuer and his predecessors ; and therefore he cannot controvert his author's possession, or ascribe it to another right, but conform to reversion and decret, must restore the right and possession he had from this pursuer's predecessors. The Commissioners repelled the defence, and decerned, reserving to the defender any other right, by way of reduction or declarator, as accords.

*Doune, Clerk.**Eodem die.*Lady O T T E R S T A N E *contra* her Husband's C R E D I T O R S.

TH E Lady Otterstane, being infest in an annualrent of 2400 merks out of the lands of Aloa, upon her contract of marriage and infestment, pursues a pointing of the ground. Compearance was made for her umquhile husband's creditors, who *alledged*, That, by her contract, it was provided, That, if there were children of the marriage beside the heir, she should restrict the said annualrent to 2000 merks in favours of the other bairns of the marriage, 400 merks behoved to accresce to her husband's creditors, who were always preferable to any provisions to her children. It was *alledged*

alleged for the children, That they ought to be preferred to the creditors ; because this provision was a restriction granted by their mother ; because it it was long before any of the creditors debts contracted ; because it was contained in their mother's infestment, and was not a private bond of provision, but such a provision as the creditors might have known by the register of feifins. The Commissioners preferred the children to the creditors, in the said 400 merks.

January 26. 1658.

Sir *ANDREW KER contra MARK HALYBURTON.*

SIR Andrew Ker of Greenhead having charged Mark Halyburton upon his bond, for relieving Sir Andrew of the half of a sum contained in a bond granted by Sir Andrew's grandfather and Mark's father to umquhile Wright, which being assigned to Andrew Ker of Chatto, Wright's son-in-law, he had obtained decret against Sir Andrew therefor: Upon which distrefs, Sir Andrew now charges the said Mark Halyburton, who gave bond, upon which he is charged; who, having raised suspension and reduction, insists upon these reasons, *first*, That the bond, granted by the said Mark, was upon mere mistake and error; supposing that he might have been made liable for the whole sum as heir, or representing his father granter of the bond; whereas he neither was nor will be heir or executor to his father. *2do*, Albeit he were liable, yet there is no lawful distrefs; because it is by mere collusion betwixt Andrew Ker of Chatto, and Sir Andrew, to be a ground to the charge; and therefore Sir Andrew is only holden as confessed in absence; whereas he hath omitted this competent defence, that the sum was paid, whereupon Mark hath raised reduction of that decret, and craved that it might be first discussed. It was *answered* for the charger to the *first*, That it is no way relevant, unless it were alleged that the charger had fraudulently circumveened, by expressing a false cause for a true, and that that was the only cause in the bond: But there is no law to take away the bond upon the granter's mistake, or upon his voluntary engagment for his father's debt; for it is very ordinary for sons, though they bruike the lands or estates by singular titles, to engage for their fathers, and can neither be free of these engagements, nor can get repetition another way, if they pay. To the *second*, There is nothing to evidence collusion. *2do*, The plea was intimated to Mark Halyburton, and if any thing was omitted, he is to impute it to himself. It was *answered* for the said Mark, That the intimation of the plea was above three years since. The Commissioners repelled the reasons of reduction, in respect of the reply, superseding execution for a year, that Mark might insist in his reduction, he finding caution, if he succumbed in the reduction.

Dounie, Clerk.

Eodem die.

Mr *JOHN STEWART* Minister *contra* his PARISHIONERS.

MR John Stewart Minister having pursued his parishioners of Cramond for his stipend, they excepted that they had made payment *bona fide* to Mr William Hay, who served as actual Minister at Cramond, admitted by the presbytery, and that before any warrant granted by the

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Council to Mr John Stewart, approving him as Minister, or preferring him to Mr William Hay, whereupon litifcontestation was made; and now, at the time, the parishioners being to prove their exception, It was *alleged* for Mr John Stewart, That he offered to prove, by the parishioners oaths, that, though they had got discharges, yet they had made no real payment to Mr William Hay, and offered to make faith that it was come to his knowledge since litifcontestation. The defender opposed the act of litifcontestation, and that there could not be a second litifcontestation in one case. The Commissioners sustained the alledgeance for the pursuer, against such of the defenders as were present to give their oaths, the pursuer making faith, that it was lately come to his knowledge.

Dounie, Clerk.

Eodem die.

The Executors of the Laird of *MOWSUAL* contra *CRAIG* of *MAXWELTON*.

THE executors of the Laird of Mowsual, pursues Craig of Maxwellton, for payment of a sum of money due by him to umquhile Mowsual by his contract of marriage. It was *alleged* for the defender, *Absolvitor*, because he was an assignee to an equivalent sum due by the defunct, which he offered to compensate. It was *alleged* for the pursuer, No compensation, because the assignation was taken since the defunct's death; and therefore, as the executors could not prefer one of the defunct's creditors to another; so much less could the defunct's debtors, by taking assignation from the defunct's creditor, prefer that creditor, without any legal diligence, to all other creditors. The Commissioners sustained the defence, notwithstanding of the reply, seeing it was only proponed for the executors who had no interest, and that the same would be competent in a double poinding to be raised against the co-creditor, by the executors, who then would dispute their preference according to their diligence.

Balfour, Clerk.

January 29. 1658.

JANET WADDELL contra — *BELL*.

JANET WADDELL pursues — Bell for the spuilzie of a mare. It was *alleged* for the defender, Lawfully poinded from Waddell's father by the pursuer; and, in fortification of the poinding, it was offered to be proven, that the mare was bought by him from an Englishman in anno 1653, and still kept, used and wrought by her till the poinding. It was *answered* for the pursuer, That the alledgeance that this mare belonged to the pursuer's father, is contrary to the libel, and she is *in libello*, and offers her to prove, that she bought the mare and a foal, and had her always in possession thereafter, albeit she suffered her father to make use of her work. The Commissioners found the defence relevant, notwithstanding the reply, seeing the defence was more pregnant, and the pursuer was, and is yet, in her father's family.

Dounie, Clerk.

Eodem

Eodem die.

Lord COLVILL *contra* the Laird of TILLYBOLL.

LORD COLVILL pursues the Laird of Tillyboll for the teinds of certain lands whereto Colvill had right by a tack granted by the minister and parson of the parish for nineteen years, and prorogate by the Commissioners for plantation of kirks. Compearance is made for my Lord Protector and the Commonwealth, who craved to be preferred and answered, because my Lord Colvill's tack is null, as being granted by the minister for nineteen years, without consent of the patron, *viz.* the King; and so is null by the acts of parliament 1617 and 1621; and the benefit thereof belongs now to the Commonwealth. It was *answered* for the Lord Colvill, That albeit his tack wanted the consent of the patron, yet that was supplied by the decreet of prorogation of the Commissioners of plantation, who had power both from King and parliament; and in the act 1617, tacks set by the Commissioners for plantation are excepted. It was *answered* for the Commonwealth, The tack being null, the prorogation falls therewith *in consequentiam*, and it is known, that the Commissioners of plantation did not consider the validity of the tack prorogate, unless alledgeances had been proponed upon the nullity thereof, which the Lord Colvill doth not, nor cannot alledge; and the exception of the act of parliament 1617 is of late decerned by the Commissioners to be granted by parties who formerly had valid tacks, and which were burdened with ministers stipends in recompence of the said burden; but does not except tacks prorogate, which are null. It was further *alleged*, That the Lord Colvill's tack and prorogation cannot be taken summarily *in possessorio*, and must be reduced. It was *answered*, There is no necessity of reduction, seeing all is produced and instantly verified, and therefore according to the ordinary, where the major is *juris*, *viz.* long tacks set without consent of the patron, is null, and the minor is *facti*, appearing by inspection, *viz.* That this is without consent of the patron, there it needs no reduction. The Commissioners found the tack and prorogation null, without necessity of reduction, and preferred my Lord Protector.

Downy, Clerk.

Eodem die.

SINCLAIR *contra* HOME.

SINCLAIR having charged Home to fulfill a contract of marriage passed betwixt him and Helen Sinclair their sister: It was *alleged* for Home the suspender, That the letters were unwarrantably granted, and ought to be suspended; because the ground charged for, being in favours of the suspender's wife, the contract could only have been registrate at his instance, and the instance of her brother. It was *answered* for the charger, That they were parties contractors with, and for their sister. It was *answered* for the suspender, That that can give them no interest to charge for provisions, not in favours of them, but of their sisters, unless the contract had borne an express provision, that a charge should be at their instance therefor. It was *answered* for the charger, That they being contractors and burden-bearers for their sister; and having paid her, to charge they had interest, and there needed no such clause inserted, unless it had been inserted for parties not contracting. The Commissioners repelled the reason, and sustained the charge, and declared they would do so in time coming, seeing it was more
fit

fit that charges should be for the securities of wives at the instance of their parents, or some contracting, than at their own.

Dounie, Clerk.

Eodem die.

ROBERT ARNOT contra WILLIAM BAXTER.

ROBERT ARNOT, having charged Jean — for payment of 1700 merks, she suspends upon double poinding. Compareance is made for William Baxter, and declarator thereupon, and *alleges*, he ought to be preferred to Robert Arnot, because he offered him to prove by his oath, that this is a renewed bond for the like sum, due by the suspenders to umquhile William Arnot the rebel. It was *answered* for Robert, who granted that this was a renewed bond, and produced the former bond, and *alleged*, It could not fall under wives escheat, because it bore annualrent, and so was heritable *quoad sistum*. It was *answered* for the donator, That he offered him to prove it was made moveable by a charge. It was *answered* for Arnot, That he offered him to prove, that umquhile William was relaxed before the said bond was registrate, or any charge thereupon, and produced the suspension and relaxation. It was *answered* for Baxter, The suspension was null, not being intimated before the day of compareance, conform to the act of Sederunt. It was *answered* for Arnot, That he opposed the suspension which was before the act of Sederunt; and though it were after the execution of the relaxation, is sufficient to take away the rebellion, tho' there were no intimation to the charger, which would only make it null *quoad* the charger. The Commissioners repelled the alledgeance duply and quadruply proponed for Baxter, in respect of the reply and triply proponed for Robert Arnot, and preferred him.

Balfour, Clerk.

January 28. 1658.

WILLIAM MILLER contra JAMES SEATON.

WILLIAM MILLER insisting in the former pursuit against James Seaton for his malicious defaming of him, before Major General Leslie, as a traitor, in anno 1651, for the damage that he sustained through his incarceration thereby. It was now *alleged*, *Absolvitor*, Because the defender did no wrong to delate the pursuer, seeing the defender was a Captain in the garrison of Burntisland under Major General Leslie, and the pursuer came over the water from the English quarters; and the defender offers him to prove, that he was informed by Jean Ker who came over with him, that he was reputed as an intelligencer or spy. 2do, It was *alleged*, That this libel inferring a capital crime, *viz.* Treason, by an express act of parliament, whereby an accusation of treason, not made out, is treason, it ought first to be criminally pursued, before damage and interest can be demanded, where the defender would have the benefit of an inquest. 3tio, Seeing it was *alleged*, That the pursuer was affoizied, and that he had a pass, these are only probable *scripto vel juramento*. The Commissioners, before answer, ordained the said Jean Ker to be examined *ex officio*.

Eodem

Eodem die.

B I R K E N B O I G *contra* S I G H T.

THE Laird of Birkenboig pursues the Laird of Sight for ejection and spuilzie. It was *alledged* for the defender, *Abſovitor*, Because he offered him to prove, that he entered in the land and meddled with the goods, being put in poſſeſſion by the purſuer, at leaſt with his conſent. It was *answered* for the purſuer, That that member of the defence anent the purſuer's conſent was only probable *ſcripto vel juramento*, as directions, mandate, and the like. It was *answered* for the defender, That ſeeing the matter of poſſeſſion was probable for the purſuer by witneſſes, the conſent to that poſſeſſion behoved alſo to be probable by witneſſes. The Commiſſioners would not ſuſtain the conſent thus ſeverally to be proven by witneſſes, but ordained the defender to condeſcend upon the manner of conſent.

Eodem die.

W I L S O N *contra* I S O B E L A D A M S O N.

WILSON, having obtained decreet of removing before the Bailies againſt the poſſeſſor of a tenement of land in Edinburgh. Iſobel Adamſon raiſed ſuſpention and reduction thereof, upon this reaſon of iniquity, That ſhe ſtood infeſt in the ſaid tenement, and by virtue thereof ſeven years in poſſeſſion, and that ſhe was not warned; but having compeared before the Bailies, ſhe both *alledged*, that dilator and peremptor upon his right, which were unjuſtly repelled. It was *answered* for Wilſon, That theſe were moſt juſtly repelled, becauſe, in the ſaid Iſobel her infeſtment produced before the Bailies, there was a viſible intrinsic, *viz.* That ſhe was infeſt by ——— and ——— as neareſt heir to the ſaid deſunct by the mother's ſide; which was evidently null, ſeeing there is no ſucceſſion in Scotland to any deſunct by the cognates having contingency of blood by the deſunct's mother, but only to the heirs having contingency of blood by the father's ſide; likeas this Wilſon was infeſt as neareſt heir to that ſame deſunct by the father's ſide. It was *answered* for the ſaid Iſobel, That it was wrong in the Bailies to take away her infeſtment *in judicio poſſeſſorio*, clad with ſeven years poſſeſſion, by a reply without a reduction. 2^{do}, The Bailies were noways competent to cognosce upon nullities. It was *answered* for Wilſon, That there needed no reduction, for the nullity was manifeſt, and inſtantly verified. The Commiſſioners found the letters orderly proceeded, and aſſoiled from the reduction; for they thought, that, albeit the Bailies were not proper to cognosce upon nullities, and that, upon that ground, the cauſe would have been advocated from them, yet the decreet being right in the matter, they would not reduce the ſame.

Balfour, Clerk.

January 29. 1658.

K E R *contra* N I D D I E.

MR WILLIAM KER, brother to the Laird of Lochtour, being infeſt by Lochtour in an annualrent out of the lands of Hayhope, for ſecurity of a ſum of money due to him by his brother, and having aſſigned the ſame to James Forſyth, they purſue a poinding of the ground; in which compearance is made for the tenants and the Laird or Niddie who is now heritor.

In which process, it was formerly *alledged* for the tenants, That the pointing of the ground can only be decerned against them conditionally, in so far as it may be extended to their teind-mails, conform to the 36th act of parliament James III. It was *answered* for the pursuers, That that act of parliament bears only, that tenants should not be distressed by the brief of distress by unjust debt, which brief, did only proceed upon personal debts; but the condition of an annualrent by an infestment is of that nature, both by the law and custom here, and in England, that it affects, not only the property of the lands, but all the crop and stock that shall be found thereupon to whomsoever they belong: And therefore, in the case, parties comparing, and offering to swear goods their own, and neither the heritors nor tenants, and yet being pointed, the pointing was found valid. It was *answered* for the defenders, That the brief of distress is general, and comprehends as well the master's real debts as personal, and is the same with a precept of pointing according to the present style; for there needed no such caution for the master's personal debts, for which there could be no colour to point the tenant's goods; and if the annualrent took effect without limitation, it would destroy the tenants, and cast waste the lands. The Commissioners restricted the pointing to the tenants rents, the terms being come and bygone, and to the heritable right. It was further *alledged*, *Absolvitor*, because the pursuer, having charged upon the bond which was the ground of infestment of the annualrent, had thereby passed from his heritable infestment, and made the same moveable, which therefore would not fall to his heirs, but his executors; and therefore, the infestment being extinct, it could take no effect by pointing of the ground. It was *answered* for the pursuer, That the charge doth not extinguish the infestment, but expressly the option of the charger to make use of the personal obligation, but prejudice of his infestment; and therefore, though a charge or requisition makes a sum moveable, and in the question between the heir and executors, prefers the executors; the ground thereof is, because the defunct, whom both represent by the charge signified by his option, that the same should be moveable, and so belonged to his executor, and in that case only, the infestment is counted as extinct; because none can be infest but as heir: But as the executor may crave pointing of the ground for bygone annualrent upon the defunct's infestment, it hath never been yet found, but that he might compel the heir to enter to the annualrent, and resign in his favours, that so he might use the infestment against any other party; but here the case is, when the charger himself is alike, in whose person the infestment stands, whether it be that charger is understood to have passed from his infestment, which would be a very evil consequence. *2do*, Though it were so interpreted, yet the only mean making the same moveable, and so passing from the infestment by the charge, the pursuer passeth from the charge, which he may do at any time, and returns to his infestment. The Commissioners repelled the defence, in respect of the reply. It was now *alledged*, *Absolvitor* from the pointing of the ground, Because the sum due to Mr William Ker for security, whereof the annualrent was granted, was satisfied and extinct by compensation, in so far as Mr William Ker was debtor to his brother Lochtour in greater sums, which are produced. By which compensation, both the sum due to Mr William by Lochtour and by Mr William to Lochtour, were *ipso jure et ab initio* extinct; in the same manner as if they had been discharged. To which it was *answered* for the pursuer, That the defender the Laird of Niddie, cannot alledge compensation upon the debt by Mr William Ker to Lochtour, because he had no right to these debts; and compensation can only be sustained, where it is proponed for the pursuer, who had right to the sums
wherewith

wherewith he would compensate, and not otherwise; for if an executor were pursued for a defunct's debt, and would alledge compensation of the like debt due to the defunct by the pursuer or his cedent, it would not be sustained, unless the executor had confirmed that debt with which he would compensate. *2do*, Albeit in that case compensation could be admitted; yet a compensation cannot be admitted upon a personal debt to take away this infestment, being a real right, which cannot be taken away by a discharge, but only by a renunciation and an order of declarator of redemption, otherwise the greatest securities of this nation, (that, by the registers, they may know the real right of any party with whom they may contract, being secure, that no private personal deed, either by discharge, assignation or compensation, can prejudice them,) should be lost; and therefore, the contrary was found in the competition betwixt the creditors of John Donaldson, where the compriser of a wadset, though long posterior, was preferred to the assignee to the same heir with the wadset, though they had got from the debtor's new bonds and payment of a part. It was *answered* for the defender, *1mo*, That compensation is competent *ipso jure*, and takes away both the debtors *ab initio*; and therefore it neither needs nor can have a right thereto, being extinct, neither needs it a discharge. To the *second*, The infestments and real rights cannot be taken away by personal rights ordinarily; yet it hath its exception, *viz.* where the infestment is not principal, but accessory to a personal right, as here, and likewise in a compensing, payment, by intromission with mails and duties. takes away the comprising, and also the ground of the infestment, being either granted by a minor without the consent of his curators, or one officious. These exceptions will be admissible to take away all real rights against singular successors. The Commissioners repelled the reason of compensation, in respect of the reply founded upon the real right: And it being then *alleged*, That at least the compensation behoved to take place for the bygone annualrents, which were now moveable, and would fall under single escheat, and belong to the executor, and were in all parts personal debts, and were compensable. It was *answered* for the pursuer, That the same reason of the real, excluded both from bygones, and in time coming. The Commissioners sustained the reason of compensation for the bygones before the intimation of James Forsyth's assignation.

Balfour, Clerk.

Eodem die.

GEORGE BAIN *contra* PETER VARNE.

GEORGE BAIN pursues Peter Varne for restitution of a pack of knives shipped by the pursuer in the ship whereof the defender was master; and which, by the fault or negligence of the defender or the mariners, for whom, in law, he is answerable, was burnt by a peat carried into the ship, and no other goods burnt. It was *answered* for the defender, *Absolvitor*, Because he offered him to prove, That the ship having landed upon Saturday, he required the pursuer to take out his goods, and declared to him, he would not be answerable for them, because the seamen would go ashore on the Sabbath. It was *answered* for the pursuer, *Non relevat*, unless it were *alleged*, That the requisition was made in due time of day; for any requisition made was only at ten o'clock at night, which was no lawful time. It was *answered* for the defender, That he offers him to prove, that others took out their goods after the requisition. It was *answered* for the pursuer, Yet *non relevat*, that others did, seeing neither they nor the pursuer were obliged

obliged so to do. The Commissioners repelled the defence and duply, and admitted the libel to the pursuer's probation.

Dunnis, Clerk.

January 30. 1658.

T R O O P contra W I L K I E S.

TR O O P having obtained decret *contra* Wilkies for a debt of their predecessors. They suspend, and raise reduction on this reason, That they were and are minors, and offered to renounce. It was *answered* for the charger, He opposes his decret *in foro contradictorio*, wherein they compeared and offered to renounce; and a time being assigned to them for that effect, they produced no renunciation. It was *answered* for the defenders, That their compearance and failing to produce were deeds whereby they were lesed, and ought to be restored against them. The Commissioners admitted the renunciation.

Brown, Clerk.

Eodem die.

J A M E S G A R D E N E R contra T E N A N T S.

JA M E S G A R D E N E R pursues the tenants of some lands that were comprised for payment of their mails and duties whereto he had right from Cumlix. It is *answered* for the tenants, That they had made payment to their master Cumlix a year before-hand. It was *answered* for the pursuer, *Non relevat*, Because only payment made *bona fide* could liberate tenants against singular successors, but payment before-hand could not be *bona fide*, because it was upon no obligation, but voluntary, and therefore upon the peril of the payer; and those that had the lands, behoved to have right to the profits thereof. It was *answered* for the defender, That payment so made before-hand, was according to the custom in that part of the country. It was *answered* for the defender, *Non relevat*, For it was a due custom, and could prejudice none but those who so agreed. The Commissioners repelled the defence.

Brown, Clerk.

R O B E R T S C O T T contra M A R Y E L P H I N G S T O N.

RO B E R T S C O T T, as assignee constitute by Katharine Johnston and M'Maur her spouse, to a bond of 600 merks, granted by Mary Elphingston. She suspends upon this reason, That this assignation was after a suspension raised at her instance against the creditors; and so the matter being litigious, she cannot be prejudged of the cedent's oath to prove her reason, *viz.* That the true cause of the granting this bond, was a legacy of 1000 merks left by umquhile Peter Johnston her husband to the cedents; and offered to prove, that, by the defunct's debts thereafter occurring, the inventory was exhausted, and so no legacy due. It was *answered* for the charger, That by this bond, 600 merks being accepted for a legacy by the nature of the agreement, it is a transaction, whereby the peril of such occurring debts was taken upon the executors, though it had not been so expressly communed to, seeing she took a discharge of the legacy *sine cautione mutiana*, before the condition of the defunct's debt was known; so if there had been no debts, as the legator could have got no more than this 600 merks,

merks, so whatsoever the debts were, he should have no less. The Commissioners repelled the reason, in respect of the reply.

Balfour, Clerk.

Eodem die.

COMMISSIONERS at LEITH *contra* the TENANTS
of NORTHBERWICK.

THE Commissioners at Leith, having arrested the mails and duties of the lands of Northberwick, for payment of the sum of 13000 merks due by umquhile Sir William Dick to the Lords of Session; and, it now being a public sum, pursue the tenants to make the arrested mails forthcoming. It was *answered* for the defenders, No process, because this arrestment having been used in the lifetime of Sir William Dick, it died with him, and no action could be founded thereupon, till first the pursuers obtained themselves executors-creditors confirmed to Sir William, and pursue thereon, or at least till the debt be established by a decret against some representing Sir William. It was *answered* for the pursuers, That they had done that which was sufficient, seeing the arrestment was a legal assignation, and that now all parties having interest were called, not only the tenants, but the nearest of kin to Sir William, as they who have the interest in his moveables, and who, *in hoc judicio*, may propone all competent exceptions, without multiplication of unnecessary processes. The defenders opposed the constant practice, that arrestments, as well as inhibitions, died with the debtor. The Commissioners repelled the defence, and sustained the libel in this order, and declared they would do so in time coming, without multiplication of processes, That where arrestments were used against parties deceasing, summons might be used against these in whose hands it was arrested, and the defunct's nearest of kin for their interest; or, if the process were raised before the defunct's death, that the same may be awakened or transferred against the nearest of kin.

Dounie, Clerk.

January 30. 1658.

MILLAR *contra* SETON.

MILLAR pursuing Captain Seton for the loss sustained by him, when he was imprisoned, upon information given by Seton against him, as an intelligencer to the English the time of the late war, and from which scandal and calumny he was, by a council of war, assoilzied at Burntisland, where he was incarcerated: This is called *actio civilis injuriarum pro damno et interesse*. *Alledged*, No process, because by the civil law *actio ista civilis injuriarum* prescribes *spatio unius anni*; especially it being verbal. *Answered*, The injury was real, and that he really suffered loss in his trade, by his misinformation 2do, He did no wrong; because, he being a Captain, and the pursuer coming from the enemy's bounds, without a pass either from the King or Estates, it was a great presumption. Likeas, he was in *bona fide* so to inform, having knowledge thereof *a fide digno*. This the Judges found relevant.

Act. Pettillo.

Alt. Gilmer.

February 1. 1758.

G R A N T *contra* the Master of G R A Y.

THERE was a suspension raised by one Grant against the Master of Gray, because the sentence was given against him *per imperitiam procuratoris*, who had omitted a defence, *viz.* That he was only executor-creditor, and could not only be conveyed for what he had intromitted with more than paid himself, and instead of proponing that defence, he ignorantly proponed an exception, wherein he succumbed. The Lords found the letters orderly proceeded, reserving action to him against the procurator.

A&: Fletcher.

Alt. Sinclair.

February 2. 1658.

M ' L U R G *contra* ———

M ' L U R G pursuing ——— to pay him the price of some ware which she took from him, and which she made use of for abulziements to her body. *Alledged*, She was *in familia paterna*, at the time of contracting of this debt; and so none could be conveyed for it but her father, and his executors. *Replied*, It was *in rem versam*, and that *ex mandato patris*, she took the wares. This was found relevant to elide the defence.

A&: Wallace.

Alt. Hamilton.

The contrary was found betwixt Sir Thomas Nicolson and Melvill, in 1654.

*Eodem die.*H E L E N C A M P B E L L *contra* the Laird of AUCHINBRECK.

H E L E N C A M P B E L L pursues the Laird of Auchinbeck, her brother, for payment to her of an aliment, and of a competent portion, as he who hath succeeded to their father's estate, and she being a posthumous child unprovided. It was *alledged* for the defender, *Absolvitor* from this irrelevant libel, because there is neither law nor custom obliging a brother to aliment or provide his sister, either as he is brother, or as he is heir succeeding to a plentiful estate. It was *answered* for the pursuer, That the defender is liable by the law of nature, as representing his father, who was bound to aliment his children, and to provide them; although there hath not been a practice for it, yet there are none against it; and though there were, this is a singular case, the estate being opulent, and the father having provided all his children competent estates and provisions by bond; and being killed himself in the service of the country, shortly after the pursuer was conceived; so that she being posthume, in this case, the cause is singular; and the mind of the defunct may be well conjectured, that he would have provided her as well as the rest, if he had known of the conception.

Balfour, Clerk.

*Eodem die.*Mr J A M E S I M E R H E A D *contra* M I N T O.

T H E Lady Minto and her children, by her contract of marriage with her husband Minto, being provided to certain provisions, Mr James Imerhead,

Imerhead, party-contractor, raised thereupon inhibition against Minto; after which Minto disposed his estate to his son, and his son to several others. Mr James, with concurrence of his daughter and others, pursues reduction *ex capite inhibitionis*. It was *alleged* for the defender, *Absolvitor* from the reduction, *first*, Because the inhibition is null, as raised at the instance of James Immerhead for fulfilling of obligations, wherein he hath no right; and the pursuit likewise is at his instance; and in so far as his daughter concurs, she cannot be heard, because her husband doth not, nor cannot concur with her against his own disposition. By the contract of marriage, it is clear, that not only the liferent takes no effect till after the husband's death, who was yet living; but for the daughters provisions, they are provided to them, only if there be no heirs-male of the marriage, and payable within a year after their father's death; so that they are conditional, and the condition not extant, because their mother is young, and their father yet on life, and may have heirs-male, and also *in diem*; and therefore they can have no effect and execution, before the condition be fulfilled, and the day come. It was *answered* for the pursuer, *first*, That he, party-contractor, and burden-taker for his daughter, may charge and use all execution for obtaining the said contract fulfilled; and so may both inhibit and reduce; especially with their concurrence, wherein his daughter may concur, and without the concurrence of her husband; seeing, in effect, it is against her husband. As to the rest, tho' bonds of provision conditional or to a day, cannot have effectual execution for payment; yet a reduction is but a recessory judgment, whereby payment is not referred, but only the other rights are taken away, in so far as may prejudice this right; and it is only craved to be declared, that when the condition shall be existant, and the day come, the provision shall take effect against the lands, and not be prejudged by the rights posterior to the inhibition. The Commissioners repelled the defences, and sustained the reduction and inhibition at the father's instance, and declared, that the defender's right after the inhibition, should not prejudice the provision in the contract. It was *alleged* for the defender, *Absolvitor*, because, albeit the right produced, granted to young Minto, whereupon his infestment follows, be posterior to the inhibition; yet he offers him to prove, and instructs that his father granted to him a disposition of the same lands before the inhibition, with an obligation to reiterate and renew the same. It was *answered* for the pursuer, *Non relevat*, unless it were *alleged*, That this disposition, whereupon infestment followed, was granted, and bears for implement of the former disposition. *2do*, The second disposition is, in effect, an innovation of the first, having several clauses therein inconsistent with the first. It was *answered* for the defender, That he needs not say the second disposition bears for implement of the first, seeing it is for the same cause with the first: And as to the innovation, *non relevat*, albeit they were different clauses in the second to innovate the disposition; seeing these will only innovate *pro tanto*. The Commissioners found the defence relevant and proven; and therefore assilized.

Downie, Clerk.

February 3. 1658.

Lady CLARKINGTON *contra* the Laird of GAITGIRTH.

LADY Clarkington being executrix-dative confirmed to Sir William Scott her husband, and, having charged the Laird of Gaitgirth, for payment of the sum of 5000 merks, due by bond by the Earl of Loudon principal, and Gaitgirth

girth cautioner, to the defunct: They suspend; and in the suspension comparance is made for — Scott, now of Clarkington, alledging, That he, as heir to his father, ought to be preferred to the sum; because, albeit it was *ab initio* moveable; yet it became heritable by a supervenient apprising against the Earl of Loudon, and an infestment following thereupon. It was *answered* for the executrix, That, after the said apprising, the defunct had charged Gaitgirth the contractor, against whom she now insists; and so the charge hath made the sum moveable. It was *answered* for the heir, *Non relevat*, unless the charge had been against the principal party, whose lands were appried; in which case only the charge could be interpreted a passing from the infestment, and so making the sum moveable: But however the cautioner can pay to no person, but who can give him interest to seek relief of the principal, which an executor cannot do, but only an heir entering and renouncing the infestment and apprising. It was *answered* for the executrix, That the charge being against the cautioner, is as well a passing from the infestment, and choosing rather personal execution than the real right; and so making the sum moveable, and to belong to the executrix, as well as if it had been against the principal, seeing the ground in both is, that by the charge the charger shews his option, rather of personal execution than the real right; and, because he cannot use both together, therefore his charge is counted a passing from the real right *pro tempore*; unless again he pass from the charge, and so make his infestment revive; which option is as well declared against the cautioner as against the principal; and therefore, seeing the defunct annulled and passed from his infestment, there is no necessity that the heir or any other enter therein. The Commissioners found the charge against the cautioner relevant to make the sum moveable, and therefore preferred the executrix. It was further *alledged* for the heir, That the defunct passed from the charge, and so received his heritable right; in so far as, after the charge, he took payment of the annualrent of his sum. It was *answered* for the executrix, *Non relevat*, unless it were alledged, that the defunct have payment of annualrents for times after the charge: Which being found necessary, the heir *alledged* payment of annualrent after the charge; which was found relevant.

Doune, Clerk.

February 4. 1658.

Sir MUNGU MONRO *contra* PATRICK GORDON of GLENBUCKIE and JOHN GORDON of PARK.

PATRICK GORDON of Glenbuckie, and Sir John Gordon of Park his cautioner, being charged at the instance of Sir Mungo Monro, for payment of a bond of 3000 merks, suspends and raises reduction, That the process now proceeds at the instance of the Laird of Philorth, Sir Mungo's assignee. Comparance is made for Patrick Nicol merchant, who produceth a bond due by him to Sir Mungo Monro, and arrestment thereupon in the hands of Sir John Gordon, of all sums due to Sir Mungo, and craved to be preferred, as being anterior to Philorth's intimation. It was *answered* for the assignee, That he ought to be preferred, *1mo*, Because there is no letters of arrestment produced, but only extract of the signet. *2do*, Intimation and execution of the arrestment are both the same day. *3tio*, The arrestment is only of the sums due by Gordon of Park, and his cautioner, to Sir Mungo Monro; but this sum is due by Glenbuckie, and Park as cautioner, and so falls not under the arrestment. It was *answered* for the arresters, That the

extract

extract of the warrant was sufficient; but, if need be, they should produce the principal before the extracting of the sentence. *2do*, Albeit they be both in one day, yet the arrestment bears to be between ten and twelve hours, and the intimation was at no hour. *3tio*, Albeit the execution bears sums due by Park and his cautioner; yet they will mend it, either by making it his cautioner; or otherways by declaring him cautioner; and that is but a mistake in the designation, designing him principal, whereas he is cautioner. *4to*, Sir Mungo, the common author, is rebel at the arrester's instance; after which no assignation made by him can prejudice. It is *answered* for the assignee, That the execution of the arrestment cannot now be changed, more than his intimation and assignation; and that the horning against his cedent doth not hinder an assignation to another lawful creditor. The arresters opposed the act of parliament against bankrupts; whereby, after lawful diligence, the bankrupt cannot prefer any other creditors. The Commissioners found either of the reasons proponed for the arresters relevant to prefer them to the assignee.

Dounie, Clerk.

Eodem die.

JOHN LYON *contra* JOHN MARK.

THE said John Lyon pursues a spuilzie of the household-plenishing of his house, the time of Tours, taken away by John Mark, and others; especially upon the act of parliament 1567; bearing, that these who keep any intercomuning with thieves and robbers, who do not make known their intercomuning to the governors of the country, within forty-eight hours, shall be holden as art and part. It is *alledged* for the defender, *Absolvitor*, because any accession he had was, *per vim majorem*, by Jackson and other two Tories, who forced him to buy their goods: Likeas, Jackson being hanged for that same cause, did, after his condemnation, freely acknowledge before the Sheriff of Aberdeen, that the defender was forced, and that they should burn his house if ever he rebelled against it; and *alledged*, that the same, being done in the night, could have no witnesses, might be proven by Jackson's declaration: The pursuer opposed the act of parliament. The Commissioners, in respect of the testificate, found the libel not relevant, unless the pursuer *alledge*, That the defender meddled with any part of the goods himself.

Dounie, Clerk.

Eodem die.

DAVID WILKIE *contra* Sir JOHN SMITH.

DAVID WILKIE, having charged James Masterton upon a ticket for the custom of certain arms imported in *anno* 1650, he suspended, and found Sir John Smith cautioner. The letters being found orderly proceeded against Masterton, Sir John Smith, being charged upon the bond of caution, suspended, and *alledged*, That by the 30th act, 1640, all arms brought home for the use of the country should be free from custom. It was *answered* for the charger, That he is not obliged to dispute that reason with the cautioner, seeing he has recovered decret against the principal compearing; and so no reason competent to the principal can be repeated by his cautioner. And as for this reason, it is proponed and repelled, That though the statutory words of the

act seem general, yet, by the narrative and conclusion thereof, it is clear, that it is only for arms brought home for a person's own use; and therefore the use hath been, that custom constantly was taken from merchants for arms. The Commissioners repelled the reason, and found the letters orderly proceeded.

Brown, Clerk.

Eodem die.

GEORGE CROOKSHANKS contra THOMAS GORDON.

GEORGE CROOKSHANKS, having a disposition of a desk in Aberdeen from Gordon of Lesmore, pursues Thomas Gordon Sheriff-depute, for ejecting him from the said desk, and putting a lock thereupon, after he had been several months in possession thereof, by sitting with his family therein, to hear the word. It is *answered* for the defender, *imo*, As to the pursuer's disposition, desks in kirks cannot be disposed without consent of the kirk-sessions; and if the desk be heritable, and follow the lands that did belong to Lesmore in that parish, then the whole lands are apprised by Mr James Cheyne, who concurs with the defender; and, if the desk be moveable, it belongs to the donator, who produceeth a gift and concurs; and as to the possession, the defender offers him to prove, That he hath right and liberty from the kirk-session, to sit in that desk, and has sat therein by the space of a year. The Commissioners found the defence, founded upon the kirk-session and the consent of the compriser of the lands, relevant; for the desk, being a part of the ornament of the kirk, cannot be disposed by any party to another, validly, without consent of the session; and that any interest of the parties follows the lands in the parish belonging to him who had the right of the desk, or to his heirs, or singular successors, albeit not expressly disposed or apprised.

Downy, Clerk.

February 4. 1658.

BAYNES contra NAIRN.

GEORGE BAYNES pursuing Peter Nairn, skipper, for the loss sustained by him in his boat, whereof he was master; in so far as calling for a peat to blow tobacco, he set down the peat beside his pack and burnt it. *Alledged, Absolvitor*, because he offered him to prove, before the alledged time of burning the pack, he required him several times to take his pack out of his boat, and he did it not. *Replied*, He must say, he required it in a seasonable time, and that he refused: Likeas, since that requisition made by the skipper, he required to have out his pack, and so he refused; and so *ultima mora nocet*. This was found relevant, and a day assigned to both to prove.

A.R. Gilmor.

Alt. Wedderburn.

This was *actio legis Aquil. ad. cap. 37. istius legis*.

February 5. 1658.

YOUNG contra GILES.

YOUNG having comprised the lands of —, wadset to one Giles, with a back-tack; conveens Giles for removing. *Answered*, Giles is infest in the lands comprised, and, by virtue thereof, in possession. *Replied*, He

He was not infest before the comprising of the back-tack set by him to the wadsetter. They repelled the alledgeance, in respect of the reply.

Aff. Cheap. Alt. Syme.

Eodem die.

The Earl of *ERROL* contra *JOHN LYON*.

THE Earl of Errol, as heir to his father, pursues John Lyon to hear and see it found and declared, that the wadset-right of the mill of Tuneff, disposed by Francis Hay, uncle to the Earl, to umquhile Alexander Lyon, and John Lyon his son, redeemable upon payment of 6000 merks, is lawfully redeemed; and that John ought to grant renunciation and resignation thereof; because, by submission and decreet-arbitral betwixt the said Alexander and umquhile Earl of Errol, Alexander submitted to the said wadset-right, and was decerned to renounce the same, upon payment of 6000 merks at Whitsunday 1637; to which submission and decreet-arbitral, the said John Lyon seuar consented to the wadset, in so far as he is subscribing witness to the submission and decreet, and the Earl's Chamberlains made payment of the 6000 merks at Whitsunday 1637, and renounced the wadset-right produced; and the said Jon Lyon, by his own declaration, hath acknowledged payment to his father of the 6000 merks; and therefore, as consenter, or at least as representing his father, he ought to grant redemption and renunciation. It is *alledged* for the defender, That that member of the libel is not relevant, that his subscription to a submission anent that wadset, or to a blank wherein the decreet-arbitral was thereafter filled up, should make him consenter thereto, seeing his subscription as witness, can only infer, that his father did truly subscribe; but his father submitting, could be of no more than of what right he had. It is *replied* for the pursuer, That he opposed the submission bearing the wadset-right expressly submitted, and whether the Earl shall pay therefor; and whatever might be the consequence of being witnesses betwixt strangers, yet being betwixt father and son, and the money truly paid, is sufficient. The Commissioners ordained the pursuer to insist against the defender, *primo loco*, as representing his father, being to fall upon the other member, that might be a preparative, whatsoever way it might be decided, unless it were necessary.

Dounie, Clerk.

Eodem die.

The Laird of *KILSYTH* contra Laird of *GLORAT*.

KILSYTH pursues a reduction of a tack of teinds, granted by umquhile Kilsyth to the Laird of Glorat: *First*, upon minority and lesion. *2dly*, As upon deathbed. It is *answered* for the defender, No lesion, Because the tack was deliberately granted with consent of the minor's curators; and that it is offered to be proven, that the cause of the granting thereof was for his service done to Kilsyth as his tutor and curator for many years; and as for any lesion, the defender is content that the pursuer have added to the tack whatever he proves the teind more worth than twenty-six bolls of victual, whereof thirteen is astricted with ministers stipends, and gives in a particular condescendance of his expences for Kilsyth, far exceeding the worth of the teind; and offers to prove the same, and repeats the same. *Answered* to the *second* reason, That deeds done for onerous causes *in lecto ægritudinis* are not null, especially setting of tacks.

It

It was *answered* for the pursuer to the *first*, *Non relevat scripto vel juramento*, by which only the onerous cause of a right can be made up, and not by witnesses. *2do*, As to the onerous cause, it is competent another way by the tutors accompts: As to the other reason, the answer is noway relevant, unless the onerous cause were, either that which would affect the heir, or were employed for his necessary aliment; but these compts, if any be, will affect the executor and the heir of line, the pursuer being only heir of tailzie. The Commissioners found the answer to the first reason relevant; and as to the *second*, the defender *alleged*, That the pursuer had taken assignation from the executors to the moveables, with condition to pay all the debt; or, at least, that the moveables were all exhausted, relevant to elide the second reason.

Downie, Clerk.

Eodem die.

HARY HENDERSON *contra* SINCLAIR.

HARY HENDERSON, having charged Sinclair for payment of a bond of 2500 merks, he raiseth suspension and reduction, and offers him to prove, that the bond, bearing only the sum resting, was for this cause, that the said Hary being donator to the escheat of Malcolm Maxwell, he thereupon obtained decret of declarator against the suspender; whereupon the suspender raised suspension in *anno* 1642, which being then discussed, litiscontestation was then admitted, and a commission granted, and a report produced; yet the charger, with a great party of armed soldiers, came to the suspender's house in Orkney, and was driving away all his goods, and took away his person, though the suspension was standing in the case foresaid; and therefore the suspender granted this bond out of fear and compulsion. *2do*, The decret of declarator, which is the cause of the bond, and the bond itself are both reduced already. It was *answered* for the charger, to the *first*, *Non relevat*, because legal execution is (*non est justus metus*), and there was no suspension intimated or shown. To the *second*, The decret of reduction in so far as reduces the bond, is null, because it is offered to be proven, that the date of the bond is posterior to the date of the summons of reduction, and it is but for non-defence, and now both are produced. The suspender opposes his decret of reduction standing, and his first reason. The Commissioners found the reason of compulsion relevant; but repelled the reason founded upon reduction, and opposed the charge against the same, both as to the bond and decret of declarator.

Eodem die.

JOHN BOSWELL *contra* the Bailies of KINGHORN.

JOHN BOSWELL pursues a reduction of a decret of the bailies of Kinghorn, given against him for 6 merks Scots of horse-hire, on these reasons, That the decret is null, as holding this pursuer as confessed, and yet he not being personally appearing, and assigning a day to him to give his oath, though it mentioned not this compearance. *2do*, It is a *non suo judice*, he not dwelling within the jurisdiction. *3tio*, The Bailies mentioned therein, Thomas Wallace and David Cunningham, were not Bailies in February 1656, at the pronouncing of the said decret. It was *answered* for the defenders, That they have produced the decret in February 1656, when the said two persons were Bailies; and albeit the defender dwelt in Aberdeen near

near the town, yet he traded and bore cefs in the town, and, if he was found there, might be cited. The Commissioners found the reason of not being within the jurisdiction relevant, and acknowledged ; and therefore reduced, and ordained the two different decreets to remain *in retentis*, till the clerk were punished.

Downie, Clerk.

Eodem die.

MARGARET ANDREW *contra* HOME of the LAW.

MARGARET ANDREW, having obtained decret against Home of the Law for the annualrent of 9500 pound, in a bond granted by her umquhile husband Samuel Cauder, and the longest liver of them two, and their heirs, and that since the decease of the husband, and in time coming during her lifetime. Home raiseth reduction upon this reason, that the decret was surreptitiously procured, upon some private suggestion, after that his reason, *viz.* that the sum was paid and discharged by the husband, was found relevant and proven by the discharges produced, as the sentence upon the back of the libel, of the date the last of February, yet bears ; and which reason is repeated as unquestionable, that a husband may uplift sums provided to him and his wife, and his heirs. *2do*, It is now added, that the said sum was paid and discharged by the husband with the consent of the said Margaret, or by her warrant under her hand, and his giving commission to pay a certain wadset on the land ; which commissions and discharges are produced. It is *answered* for the defender, To the *first*, That she opposes her decret *in foro contradictorio*, and that the sum here is granted to be borrowed by her and her husband, and was for the price of the lands liferented by her, and sold to Home of the Law. The Commissioners found the reason of the discharges granted by the husband with consent of the wife relevant ; and therefore gave no answer to the other reason which might clash with the former decret.

Brown, Clerk.

Eodem die.

Captain MURRAY and his Assignee *contra* Sir JAMES RAMSAY.

CAPTAIN MURRAY and his assignee, pursues Sir James Ramsay to pay to him 54 pounds Sterling monthly, for three months pay, as Captain of a troop under Sir James ; which pay, the Earl of Essex granted a warrant to the _____ of the arms, to answer to Sir James, and was received by Thomas Ramsay his servant, who, by his testificate, declares, of that sum he paid only six weeks, and no more. It is *answered* for the debtor, That the writs are not sufficient to prove Sir James's receipt of the monies, being only attested copies from the muster of the army ; and that Thomas Ramsay was not servant to Sir James, but Quarter-master, whose receipt can never bind it upon a Colonel ; and the said Thomas's declaration bears ten weeks to be paid. The Commissioners found, that the testificate produced could not instruct to make the debtor liable, unless it were offered to be proven by writ or his oath, that he gave warrant to Thomas Ramsay to receive the money for this use.

Downie, Clerk.

*Eodem die.*Mr HUGH TROY *contra* PARISHIONERS.

MR HUGH TROY, having designed to him four acres of vicar-land for his glebe, insists for a proportional part of sixteen souns grafs following the vicar's lands. That by a practique of the 2d February 1630, between Hamilton and Kennedy, a minister being in possession of souns grafs, following a vicar's lands, restricted to a horse and two cows grafs. The Commissioners, considering that the pasturage acclaimed was of moment, and more worth than the glebe designed, restricted the same to a horse and two cows grafs, as therewith, were found requisite for a minister by the act of parliament 1649.

*Balfour, Clerk.**Eodem die.*Mr JAMES SCOT *contra* his PARISHIONERS.

MR JAMES SCOT sometime minister of Tringland, pursues the parishioners of Tringland, upon the act anent manse and glebe 1649, to pay to him the reparation of the manse, conform to his accompt, extending to L. 950, being ten merks upon ilk merk-land of 100 merks within the parish, or L. 24 : 3 : 2, upon ilk L. 100 of valued rent. It is *answered* for the defenders, that he can found no right upon the act 1649, because he was deposed before the act. *2do*, *Absolvitor* from the expences of reparation, because they were unnecessary ; in so far as, it is offered to be proven, that there was a competent manse at his entry, which he relinquished and demolished. *3tio*, Defalcation ought to be had of timber, and other materials of the kirk of Tringland, and taken down by him to repair the said new manse. It is *answered* for the pursuer, To the *first*, Oppones the act of parliament relating, not only to the future, but to the practique. To the *second*, Oppones his designation designing this manse. To the *third*, Oppones his accompt, whereby it appears, that the timber and laith of the old manse was made use of, and that that is in the accompt ; as for work, workmanship, timber and glass. And for what was paid to the former minister, and for the kindness of former possessors of the glebe, building of dykes. The Commissioners found the pursuer had no interest to the reparation, conform to the act of parliament 1649, but only for that which would not exceed L. 500, conform to the act 1612 ; and found that defence relevant, that there was a sufficient manse at his entry.

*Brown, Clerk.**Eodem die.*MAXWELL *contra* HERRIES.

MAXWELL of Drumcoultren pursuing Herries, being formerly debarred with horning, grants assignation, and the assignee now pursues. It is *alleged*, That the cedent being judicially debarred, the assignee can be in no better condition, and cannot have action, till he be relaxed. The Commissioners found the horning to debar the assignee.

*Balfour, Clerk.**Eodem*

Eodem die.

Mr *ANTHONY SHAW contra* COMMISSIONERS
for visiting UNIVERSITIES.

MR ANTHONY SHAW minister of Calmonell, pursues reduction of a decret and order of the Commissioners for visitation of universities, whereby they granted commission for localling the stipend of the kirk of Irvine, upon the parish of Irvine, as it is now after the dismembration and annexation, by decret of the Commissioners for plantation, in *anno* 1650; in so far as concerns the lands of Ardmillan annexed to Irvine from Calmonel, upon this reason, that the decret was without calling or hearing of the pursuer, or any other party, and proceeded from them who had no power to take away the decret of locality of the kirk of Calmonell in 1649, localling a part of the stipend out of the lands of Ardmillan, which they annexed to Irvine, did not import any change of the locality of Calmonell, as was ordinary in such cases. It was *alledged* for the defender, No process, because the decret of the Commissioners for visiting of universities is not reducible in this court, seeing they succeeded in place of the commission for plantation; and now, what was proper to them is assumed by the Council, and all three are co-ordinate supreme courts. The Commissioners superseded to give answer, and resolved not to meddle with matters proper for the commissioners of plantation, but endeavoured to supplant till a new commission.

Balfour, Clerk.

February 6. 1658.

HODGE contra the PARISHIONERS of *GLADESMUIR.*

IN the case disputed *in presentia*, betwixt Mr Robert Hodge and the parishioners, &c. They found and declared, they would not meddle, to reduce any decret given by the commissioners for plantation of kirks, either in relation to bigging or providing of kirks, or in relation to localities; in respect their commission flowed from the parliament, with whose decreets, or their commissioners, they would not meddle.

Act. Wedderburn.

Alt. Gilmour.

February 9. 1658.

DAVID BAILIE contra *DAVID INNERHEAD.*

DAVID BAILLIE pursues a general declarator of the escheat of David Innerhead. It is *alledged* for the defender, *Absolvitor*, because he hath a gift of his own escheat, after his relaxation; which, though posterior to the pursuer's gift, yet the goods being in his own hand, is equivalent to a declarator; and so is preferable to a prior gift with a posterior declarator. It is *answered* for the pursuer, That he hath not only a prior gift, but also hath done diligence by a summons of declarator before this last gift. The Commissioners found the reply relevant.

Downie, Clerk.

Eodem die.

*Eodem die.*ANDREW BRYSON *contra* ELISABETH DUNDAS.

ANDREW BRYSON pursues Elisabeth Dundas, as heir to Newliston her father, for declaring of the back-tack of the land wadset by her father to him. It is *alledged* for the defender, Compensation by a greater sum due by the pursuer to the defender's father. It is *answered* for the pursuer, *Non relevat*, unless the defender have right to that sum, either by entering heir if heritable, or confirming it if moveable. It is *answered* for the defender, That compensation is competent *ipso jure*, and takes away the debt like a discharge. The Commissioners found the reason of compensation relevant for satisfying the years before Newliston's death.

Dounie, Clerk.

*Eodem die.*The Laird of HALKERTON, &c. *contra* the HERITORS and others of the Shire of KINCARDINE.

THE Laird of Halkerton and Laird of Pitkerro, and Ballmine, pursue the heritors and others of the shire of Kincardine for 5 s. *per diem*, for ilk of their expences to the parliament, to be paid by the vassals of the King and Prince of the lands, as they were there holden within the shire, conform to the valuation. It was *alledged* for the defenders, No process, till first a certificate was produced of the clerk of the parliament, that the pursuers were Commissioners, and of the days that they attended. *2do*, No process, but against the King and Prince's vassals, which behoved to be proven. *3tio*, No process for payment, conform to the public valuations for assessments; because, contrary to the act of parliament, appointing them only to convene and stent themselves; and so were not obliged to pay according to their valuations. It is *answered* for the pursuers, To the *first*, They referred the same to the Lord Register, then clerk to the parliament. To the *second*, They opposed the act of parliament, allowing the first and last days of the parliament, and so many days to come and go. To the *third*, *primo loco*, insisted against the King's vassals, who were, and now are, on life; and they needed not prove them to be the King's tenants, for they were so presumed, unless they had been vassals to others. To the *last*, No necessity of stenting, seeing the valuation was a most just stent and rule. The Commissioners found the libel not relevant as it is conceived, and assoilzied therefrom.

Brown, Clerk.

*Eodem die.*JOHN GORDON of LITTEMILLAN *contra* Sir WILLIAM DOUGLAS.

JOHN GORDON of Littlemillan pursues Sir William Douglas for restitution of the sum of L. 500, unjustly extorted from him in December 1647, by threatening to quarter a troop upon him, and that as an *alledged* fine put upon him as a malignant, which he acknowledged by his back-bond produced, granted the receipt of that money, and obliged himself to be comptable to the Estate and the pursuer. It is *alledged* for the defender, *Absolvitor*, because, by the act of indemnity 1647, the act of council relates only to the

the late troubles of the Tories. The Commissioners repelled the first defence upon the act of parliament, in respect the pursuer was not then in rebellion, but under protection, the time of the paying this sum; and repelled the second defence as only relevant to the theft and robbery the time of the Tories; but found the third defence relevant, that the same was voluntarily given to the defender for a greater fine.

Brown, Clerk.

Eodem die.

MARGARET DOUGLAS contra CAVERS and her SON.

MARGARET DOUGLAS, having intented reduction of a disposition by her to Sir William Douglas of Cavers, and to John Douglas her son, of certain of her lands, upon minority and lesion; litiscontestation being made before the Lords of Session, and now wakened, the defender, upon supplication, was admitted to propone, what he had further to alledge; who alledged, that the said reason ought to be repelled, because the said Margaret Douglas had homologate the disposition, in so far as she had assigned a part of the lands disposed to Patrick Douglas, to whom payment was made accordingly. It is *answered* for the pursuer, That that the alledgeance ought to be repelled; because the alledged homologation is by virtue of an assignation made by Margaret Douglas to Patrick Douglas and Peter Hoy, proportionally, to two sums due to them by her; in which she not only assigns the price of the lands, but likeways a reduction of the disposition, with a provision, that it fall with no homologation. It is *answered* for the defender, That no such provision can hinder homologation to be homologation; and therefore the disposition cannot be reduced in part, and homologate in part, but homologation of a part must make the whole stand. The Commissioners found the homologation of the other assignee, not to prejudge the pursuer as assignee to the other part, in so far as concerns his five sixth parts of the sum and lands.

Downy, Clerk.

February 10. 1658.

DOUGLAS contra DOUGLAS.

IN the foresaid case betwixt Douglas and Douglas, it was farther *alledged*, That the defender, being reponed to alledge against the former act of of litiscontestation, did now *alledge*, That the first member of the act, *viz.* That the pursuer's disposition was by her being minor, without the authority of a Judge, is not relevant, unless she alledge also lesion, because, albeit the authority of a Judge be necessary for dispositions made by pupils, who have not *judicium et disponendi facultatem*; yet minors past pupillarity having that faculty, may dispone; but in respect of the liberty, they have only benefit of restitution if they be lesed, as was already found in the first practise of Durie's second book: And as to the *second* member of the said act, it is not relevant as it stands, *viz.* That the pursuer was minor, was lesed, in so far as the lands were worth 600 merks by year; unless it were also *alledged*, That they paid that rent, by the worth of land. It is presumed by the ordinary use of payment thereof, and ought not to be subjected to the conjecture of witnesses. It was *answered* for the pursuer, To the *first*, that

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member of the act is yet most relevant, and consonant to the civil law, and other daily practiques, whereby minors pursue decreets for selling their lands; which would be useless, if that member was not relevant, without lesion. As to the *second*, It stands also relevant, because the question being in the lesion by the selling, there is no necessity to prove what it actually paid, but what it was worth, and might have paid; seeing the price follows the worth. It was *answered* for the defender, To the *first*, that whatever minors may do for the farther security of buyers, by the authority of a Judge; yet it is not necessary, neither would such a decret stand valid, if the minor were lesed, by omitting any thing that might have been reponed. The Commissioners found the first member of the act not relevant; but found the second relevant as it stands.

Dounie, Clerk.

Eodem die.

Mr WILLIAM KER and JAMES FORSYTH *contra* the
the Laird of NIDDERY.

MR William Ker and James Forsyth his assignee pursuing a poinding of the ground of Hayhope, upon an annualrent, granted out of it by the Laird of Lochtour, then heritor thereof. The Laird of Niddery, now heritor, compeared and *alleged* compensation against the bygone annualrents, preceeding James Forsyth's assignation, by debts due by the cedent to the Laird of Lochtour, debtor; which, being formerly sustained, the question was now anent the matter of probation; for it being *alleged* by Forsyth, that the compensation was only relevant against him *scripto*, at least, by his own, and not by the cedent's. It was *answered* for Niddery, That before James Forsyth's assignation, Lochtour had suspended, whereby the matter had become litigious; after which *litem pendente inviolanda*, and no deed by either party can put the other in a worse condition; otherways, whenever a charge is suspended, upon reason referred to his oath, to evite his oath, he will assign. It was *answered* for the pursuer, That he was *in bona fide* to take the assignation, neither knowing nor obliged to know the suspension. *2do*, Albeit he had known it, there is but part of the sums now craved to compensate which are contained in the suspension, and which therefore cannot extend to any more sums: And it is a general rule, that after a cedent is denuded, his oath cannot prove against the assignee; which would also prove a great inconvenience as to the other. It was *answered* for the defender, That the question is not here, Whether the pursuer took assignation *bona fide* for the payment, which is necessary, and may be compelled, made *bona fide liberatis*; yet taking an assignation which is voluntarily, though *bona fide*, cannot shun many competent *allegeances* against the cedent, as upon discharge *vi et metu*, or minority; and so, the exception of being litigious, hinders the change of the party's condition; and therefore the cedent, not deponing in prejudice of the assignee, hath that ordinary exception *nisi in re litigiosa*: And albeit, the whole sums be not in the libelled reason of suspension; yet it is ordinary to eik reasons; and the litigiousness suffers not either party's condition to be made worse, either for defences of reason *alleged*, or that might be *alleged*. The Commissioners found the reason of compensation relevant to be proven by the cedent's oath, in respect of the reply.

February

February 10. 1658.

VEITCH contra WILKISON.

IN a case between Veitch and Wilkison, found, That an heir of conquest may be immediately convey'd, unless the heir of line be immediately condescended on; and what he has to succeed to.

Act. Dunmuir.

Alt. Birnie.

February 11. 1658.

S C O T contra ———.

IN a case betwixt Mr Laurence Scot, &c. found, That though a giver of a wadset granted a discharge of the reversion to the wadset-receiver, and that he have an heritable and irredeemable right of the lands wadset; yet that the cautioner, in the requisition, is not free; and that a renunciation or discharge of reversion is consistent with a clause of requisition.

Act. Wallace.

Alt. Syme.

Eodem die.

Countess of BUCCLEUGH contra SCOT.

IN was debated betwixt the Countess of Buccleugh and one Scot; if a patron, *qua* patron, since the act of parliament 1649, has right to the haill teinds of the parish, not exhausted by the minister or parson; and this was to be heard *in presentia*.

Eodem die.

DAWY CLARA BERNARD contra TENANTS.

DAWY CLARA BERNARD, being infest in liferent of the lands of Jure by her husband General Ruthven, pursues the tenants for mails and duties as intronitter. It is *alledged* for the defender, *Absolvitor*, Because the Lady's right was granted by her husband after his marriage; and so being a donation between man and wife, was revocable, and was revoked by the absolute disposition thereof to him. *2do*, The Lady her sister, by her missive letter, had consented that the lands should be sold, and she denuded. It was *answered* for the pursuer, To the *first*, That it ought to be repelled, because the disposition bears expressly consideration of marriage, and because the Lady had left her native country; and therefore, being *donatio propter nuptias*, whether before or after marriage, it is revocable. As to the *second*, The letter can never import a consent to his particular disposition, but only a willingness to dispoise for the defender's relief; and as for the factory, it was surreptitiously procured upon trust, and the acknowledgment that it was sold is false, and cannot be proven. It was *answered* for the defender, To the *first*, That a contract of marriage, and the infestment following thereupon after the marriage, are not revocable, because they are in lieu of a legal provision of a terce; and so no pure donation; but this disposition is no contract. To the *second*, Oppones the letters, it being all one to consent for a disposition in general, and to this disposition in particular. It was *answered* for the defender, that a provision, and contemplation of a marriage is not revocable, whether by way of contract or

no;

no; and for the alledged difference, it hath no weight, seeing oftentimes the provisions and contracts of marriage are not in satisfaction of the terce; and therefore does not exclude the same, and is never revocable. The Commissioners repelled the first defence in respect of the reply, but found the second defence of the consent relevant, and proven by the witnesses produced. It was *alledged* farther for the pursuer, That seeing the letter importing her consent, was only for relief to the defender, and seeing it is acknowledged, that there is 14,000 merks of the price yet in his hand, she ought to have payment of that part of the price, as succeeding in the place of the land, for payment of her years bygone liferent-duties, and in time coming. It was *answered* for the defender, That he could not be decerned to pay that price to the pursuer, seeing he had granted bond therefore to Lady Jean Ruthven, who was assignee to the Earl's daughter, whereby he would be liable in double payment. The Commissioners found the reply relevant, and decerned the said sum, and annualrents thereof, to be paid to the pursuer for satisfying her liferent-duties bygone, and in time coming; superseding execution for a year, that, in the mean time, ——— might call Lady Jean, the Lady and others representing General Ruthven, that his rights may be supplied by double pouding.

Eodem die.

JOHN HUTCHISON *contra* MARGARET CATHCART.

JOHN HUTCHISON, having obtained decret against Margaret Cathcart, as heir to her father, instructed by her seisin, she suspends, and *alleges*, 1^{mo}, That the only ground whereupon she was decerned in absence, was her seisin as heir, which she has now reduced; so that that ground being taken away, and she willing to renounce, the letters ought to be suspended. 2^{do}, The debt charged for was a debt due by her father as cautioner for Waterhead; and she offered her to prove paid. It is *answered* for the pursuer, That the first reason ought to be repelled, because the reduction of the suspender's seisin is after his decret, and he not called; and so it cannot prejudice him, and there is no reduction. 2^{do}, The second reason is not verified. It is *answered* for the suspender, That the first reason stands relevant, because there is no law, obliging her to call the charger to the reducing of her seisin; but if the charger will alledge any thing that could take away her reduction, relevant. To the *second*, That though in a suspension a cautioner ought to have a time to prove the payment of a debt by the principal, seeing the discharge is not his own writ. The Commissioners repelled the first reason *hoc loco*, but prejudice to the suspender to reduce as accords, and granted a time for the second reason.

Balfour, Clerk.

Eodem die.

P A R K *contra* P A R K.

IN a competition betwixt Park as heir to his brother, and Park as executor to the father, it was *alledged*, That the same question being heritable by bond, bearing annualrent, before 1591, belonged to the heir of his brother, to whom it was assigned by his father. It was *answered* for the executor, That it belonged to him as his father's executor, albeit it bore annualrent; seeing his father, who was creditor, died before the time, whereby it became moveable. It was *answered* for the heir, That his father was denuded

denuded by the assignation to his brother, to whom he is heir; and so his father being no more creditor, his death did not make it moveable. It was *answered* for the executor, *Non relevat*, unless it were *alledged*, That the assignation was intimated before the cedent's decease, otherwise the cedent was not denuded; and the sum remained *in bonis defuncti*, and was confirmable. It was *answered* for the heir, That albeit, in a competition with any stranger, intimation was requisite, yet, against the executors of the cedent, the naked assignation was sufficient, as a disposition would be against his heir, and would either exclude his executor, or recover it from his executor. The Commissioners preferred the heir.

Dounie, Clerk.

February 12. 1658.

D U N B A R contra T U L L O C H.

GEORGE DUNBAR of Achiskie, pursues a general declarator of the escheat of Thomas Tulloch. It was *alledged* for the defender, *Absolvitor*, because the pursuer's gift is upon the delivery, being convict for forgery, upon false writ; and true it is, the defender hath a gift from the King in exchequer anterior to the pursuer's, not only remitting the crime, but all delinquency that may befall to the defender's person, lands and goods; which is equivalent to a gift of escheat. It was *answered* for the pursuer, That whatsoever may be the stile of the foresaid remission, yet it can never import a gift of escheat, or take away the benefit of the exchequer, or donators. *2do*, All such remissions, granted without assythment of the party, are null. It was *answered* for the defender, That it is not a common stile of remission, but the tenor thereof differs, as the King and Exchequer pleases to grant; and they are accordingly extended to their several tenors; neither did the escheat fall here by the party's being denounced rebel or fugitive, but only by the party's conviction of the crime, which being fully remitted, with all that followed thereupon, the pecunial part of the pain, confiscating the moveables, is also removed: As for the heir's assoilziement from the improbation, it hath taken away the forged writs, whereby the party is *in statu quo prius*. The Commissioners found the defence upon the remission, relevant and proven; and therefore assoilzied.

Dounie, Clerk.

February 13. 1658.

M' C L E A R contra P A T E R S O N.

JAMES M'CLEAR pursues Paterfon for compt and reckoning, of a sum, assigned by the pursuer's father to Paterfon, conform to a back-bond granted by Paterfon, declaring the same to the pursuer's behoof, and that he should compt therefor, deducing only his expences. It was *alledged* for the defender, No process, till the pursuer granted a discharge for a part of the sum, contained in the assignation, due by one Still; because the pursuer's father had, in name of the pursuer, and taking burden for him, declared, that the defender should not be obliged to compt till that discharge was granted; and so had qualified the assignation and trust granted by him to the defender, to the behoof of his children, and the back-bond granted by the defender for that effect, which he might lawfully do, as lawful administrator to the pursuer his son, and as father, who had freely granted the foresaid assignation for a provision to the pursuer. It was *answered* for the pursuer, That the foresaid de-

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claration

claration could not prejudice him of his assignation, because his father, as tutor and lawful administrator, could not, in his prejudice, discharge or qualify the assignation; and as his father, granter of the provision, he could neither call nor qualify, after it was perfect, delivered to the defender to the pursuer's use; for though a father might alter his children's provision, so long as they were undelivered, yet not after delivery. The Commissioners found the defence relevant; and that a father might alter or qualify a provision, voluntarily granted to his children, albeit delivered.

Eodem die.

Laird of SWINTON *contra* WEDDERBURN.

THE Laird of Swinton, pursuing a declarator of property, of a parcel of ground called the *Threepyards*, against the Laird of Wedderburn, who was a minor and infest *cum omni pastura*, and in possession past memory of man: It was debated, if an infestment of property and commonry were consistent? and was to be heard *in presentia*, and is not yet decided.

Act. Gilmor.

Alt. Wedderburn.

February 14. 1658.

M'NAUGHT *contra* M'NAUGHT.

M'NAUGHT, for sums of money, disposes some lands to M'Naught, and the heirs-male got of his body, which failing, to his heirs whatsoever, and obliges him to do nothing in prejudice of the tailzie; then he, to whom, and his heirs, the lands are tailzied, having no heirs-male, resigns the tailzied lands in favour of his own daughter; where an heir of line to the first tailzie raises a reduction of that infestment, made in favours of the daughter, upon the clause contained in the tailzie; by which it was declared, that failing of heirs-male of his body, the lands to belong to her: Wherein it was debated, *1mo*, If M'Naught, to whom the tailzie was made, was that person who might be conveyed for implement of that obligation of the tailzie, whereby the tailzier and his heirs were obliged to do nothing in prejudice thereof. *2do*, Then it consequently fell in, if M'Naught might break the tailzie, as he had done; whereby it was *alleged*, That it was altogether elusory of the meaning and intention of the first tailzie, if M'Naught, to whom, and his heirs-male, the lands were disposed, were not that person who might be compelled in law to fulfil the said obligation: On the other hand, *alleged*, That though the first tailzier had tied himself and his heirs to do nothing in prejudice of the tailzie; yet M'Naught, who had paid sums of money to him therefor, had not tied himself to do nothing in prejudice thereof; and that he was not that person that represented the first tailzier for implement of that obligation. The Lords found, after much debate *in presentia*, that M'Naught might break the tailzie, and assoilzied from the reduction.

Act. Wedderburn.

Alt. Nisbet.

February 15. 1658.

R A M S A Y *contra* ———.

IT was found in the case of one Ramsay, pursuing the heir of one interdicted, to pay a sum contracted by his father. *Alleged*, No process against him, so as to distress his person, or yet to affect his heritage, because

cause he was interdicted. *Replied*, That he behoved to be personally liable, and his moveables might be poynded; because the person interdicted might be so distressed. *Duplied*, Tho' the person interdicted was personally liable; yet the heir could only have his moveables poynded, because, if he might be distressed personally, he behoved to sell his heritage for the freedom of his person; and so it would prove elusory of the meaning and intention of the interdiction. The Lords found the heir of the interdicted person could not be distressed *personaliter* for the said cause, but only his goods might be poynded, though the man interdicted may be personally distressed; and found a vast difference betwixt the father interdicted, and the son, in reference to the execution real or personal: Likeas an interdiction was only found to operate against lands lying in that shire where it was published; and that lands, lying in other shires where it was not execute, might be comprised for the debt.

Ad. Syme.

Alt. Heriot.

February 16. 1658.

F O R B E S *contra* M U R R A Y.

AGNES FORBES pursues Patrick Murray, her husband, for an aliment, in respect he had unjustly wronged her, by beating and wounding of her several times to the hazard of her life, whereby she had been been bedfast for many months; by accusing her, and pursuing her criminally for adultery, wherefrom she was assoilzied without any ground of suspicion. It was *answered* for the defender, No process, because this, being a separation, ought to be tried by the Commissaries in the first instance. *2do*, *Absolutor*, Because the husband offers to take home his wife, and to find a sufficient cautioner for her indemnity, and freely living with him as his wife, which could not but stop her process of separation or aliment. It was *answered* for the pursuer, To the *first*, That there was no civil process incompetent to this court, to which the Commissaries are subordinate; and though the case had been a pursuit of divorce upon adultery, or incapacity, which might have required long trial and proof, it might have been remitted to the Commissioners; yet here the matter is only for liberty of separation, seeing the defender hath *de facto* separated. To the *second*, If there had been only menaces, and like injuries, caution might have secured the pursuer; but here she, being in such imminent danger of her life, neither can be secure, nor ought to accept caution: And *alleged* the case between Lord Halkerton and his lady, and ——— Sibbald and his wife, to whom the council granted separation and aliment. The Commissioners repelled the first defence; but found the second defence relevant, the defender always giving in sufficient caution for indemnity, under this penalty, that if he shall contraveen the pursuer of her own consent, she should live apart, and have an aliment to be modified by the court before the close of the cause.

Brown, Clerk.

Eodem die.

P O R T E R F I E L D *contra* Sir R O B E R T S T E W A R T, &c.

GEORGE PORTERFIELD, for some debts owing to him by Sir Robert Stewart, arrested in the hands of Kilburny all sums addebted to Sir Robert; and because Sir Robert had not taken the bond in his own name, but in the name of Dean Barclay his good-brother, who had assigned it to Mary

Mary Barclay his daughter, who had transferred it to George Stewart, Sir Robert's natural son, all being confident persons, to the behoof of Sir Robert; yet, because the debtor could not depone, that it was Sir Robert's money, being in other names, or might not safely be put to depone, for fear of double distress at the confident persons instance; therefore, George pursued the debtor Sir Robert, Dean Barclay and his daughter, and George Stewart, to hear and see it found and declared, that the sum belonged to Sir Robert; and that their names were but in trust for his behoof, that thereupon the pursuer might insist to get it made forthcoming, as Sir Robert's money, upon the arrestment, or might affect it by his legal diligence; and the pursuer referred the whole libel to all the defenders oaths. It was *alleged* for George Stewart, That seeing the sum stands now in his person, the libel was not relevant to offer to prove the trust by the cedents oaths, after they were dennded; whose oaths, albeit they were taken, could prove nothing against him; but the pursuer had a competent remeid, by reducing the the assignation and translation as fraudulent, after contracting of his debt. It was *answered* for the pursuer, That albeit, *regulariter*, the oath of the cedent cannot be taken in prejudice of the assignee, yet, in a case of fraud, wherein there is such great presumption, the conveyance being amongst persons of so near a relation, and now standing in the person of Sir Robert's natural son, he having no other children, and carried on by Sir Robert's own Lady, the same may be proven by all their oaths, as pursuers. The Commissioners would sustain the defenders oaths, as in the libel or reply; but, in respect of the appearance of collusion, before answer, ordained all their oaths to be taken *ex officio*, but prejudice to George of his defence, why they could not prove against him.

Brown, Clerk.

Eodem die.

SCOTT and KINLOCH contra WALLACE.

MR Laurence Scott and Mr James Kinloch, having wadset the lands of Gallryside to Richard Wallace, for 5000 merks, containing a clause of reversion and requisition, thereafter for the sum of 2000 merks, they discharged the reversion, and now pursue the said Richard to hear and see it found and declared, that the clause of requisition was extinct, and that he ought to discharge the same. It was *alleged* for the defender, That the libel was not relevant, seeing there was no obligation upon him to discharge the requisition, though the pursuer discharged the reversion, which might well be consistent; for thereby the pursuer granted option to the defender, either to keep the irredeemable right of the land, or otherways, if he pleased, to charge for his money and quit the lands; and as the defender might have discharged the requisition, which would not have discharged a reversion, which has been oftentimes done; and so, on the contrary, the discharge of the reversion cannot import the discharge of the requisition. It was *answered* for the pursuer, That, albeit, by express paction, it might be so agreed, that the defender might either keep the irredeemable right of the land, or discharge for the money; yet, where it is not expressly provided, albeit the discharge of the requisition be omitted by mere neglect, the meaning of the parties, and the matter itself, is presumed to be, that the defender would be absolute heritor; and the debtor and creditor should cease. It was *answered* for the defender, That it cannot so be presumed in this case, where the defender was a poor ignorant man, and the pursuer a skilled man in writs, being

being once a sub-clerk in the session, so that it cannot be thought accidentally omitted: And now, as the defender is like to be put from the lands by this pursuer's sister's liferent, he is only obliged for warrandice from his own deeds, and Mr John Kinloch for absolute warrandice, who is *insolvendo*; so that he is like to lose both his land and his money. The Commissioners found the defence relevant, and assolizied the defender.

Dounie, Clerk.

February 17. 1658.

M'NAUGHT contra M'NAUGHT.

JOHN M'NAUGHT having disponed his lands in tailzie, and resigned the same in favours of himself, and the heirs-male of his own body, which failing, in favours of John M'Naught merchant in Edinburgh, and the heirs-male of his body, which failing, in favours of the heirs whatsoever of the said John M'Naught; and, after the dispositive words, there is a clause whereby the disponer binds and obliges him, and his forefairs, to do no deed that may break the tailzie: Whereupon, Roger M'Naught having succeeded as heir-male and of provision to the disponer, and John M'Naught the merchant having succeeded as heir of tailzie to Roger, the said John the merchant broke the tailzie, by resigning the lands in favours of himself and his heirs, whereby Sarah M'Naught, his daughter, is now infeft as heir to him; and therefore Nicolas M'Naught, daughter to John M'Naught, as heir, by virtue of the said tailzie, in these lands, pursues the said Sarah M'Naught, as heir to John M'Naught the merchant, to hear and see it found and declared, that he had done wrong and contraveened the obligation of the tailzie not to break the same, and that the defender, as heir, ought to resign in favours of the pursuer as heir of tailzie. It was *alledged* for the defender, *Absolutor*, because the foresaid obligation of — and his forefairs, could not oblige John M'Naught the merchant and his heirs, nor the heirs of tailzie, but only the heirs of line of — and by — forefairs, there is repeated the obligation to resign, which expressly bears, that — obliges himself and his heirs whatsoever to resign; especially seeing the tailzie was by way of contract betwixt — and the merchant: And so if it had been the meaning, it would have been expressed, that neither party contracted, nor their heirs of tailzie, should break the tailzie; and therefore the clause must be interpreted against — expresse thereof, in whose power it was to have expressed it more clearly; *nam verba dubia sunt interpretanda contra proferentes*: And if the heirs of tailzie were meant by his forefairs, then the clause should be elusory, and signify nothing; for then, if any of the feuars for the time dispone to a third party, the other members of the tailzie could not be quarrelled, because they were heirs to the disponer, and so obliged to fulfil his deed. It was *answered* for the pursuer, That the defence ought to be repelled, in respect of the obligation, not to break the tailzie, which is immediately subjoined to the dispositive clause in the tailzie, expressing the heir of tailzie; so that *foresaid* must respect that which doth immediately proceed, *viz.* the heir of tailzie. *2do*, If the heirs of the tailzie were not meant, then the clause were elusory, because it was not in the power of any other heir, but the heir of tailzie, to break the tailzie. *3tio*, The meaning of the parties is clear, the contract bearing expressly to be for the continuing of the estate of — in the name of M'Naught, in which it had long been, and without any onerous cause, but 300 merks; and it cannot be thought that — would debar himself, and his heirs, to break the tailzie, and yet would

allow the merchant, who was freely assumed as heir of tailzie, to break the tailzie, in prejudice of the disponent's heirs, to whom it last returned, which cannot be understood of the heir of line; because, if——had had his eldest son living, and succeeding as heir-male, and had died leaving but a daughter, and a second son succeeded, who had broken the tailzie of the merchant, had quarrelled that second son for breaking of the tailzie, he might have alledged, as the defender doth, that he was not comprehended in that obligation, not being his father's heir of line, but his eldest brother's daughter: and whereas it is alledged, that if the heirs of tailzie were meant in the obligation, it would render it ineffectual. It is true, that if any of the feuars did dispoise to a stranger, neither the heir of tailzie nor line could quarrel his deed; but where one of the members of the tailzie dispoises to another who is not a stranger, but represents the disponent, there the next heir of tailzie, in respect of the defender, as heir of line, is but a stranger, and so may pursue the defender, as heir of line, to perform the obligation. The Commissioners found the defence relevant, and assilzied; for they thought the obligation was to be regulated according to the obligation to resign, and namely to bind the resigner himself, and his heirs whatsoever.

February 18. 1658.

M U R R A Y *contra* G O R D O N.

PARK GORDON, being debtor to Sir Mungo Murray in a sum of money, and charged therefor, suspended; wherein comparance is made for Dean and Braidie, assignees by Sir Mungo, and Patrick Nicol arrester: The arrester being formerly preferred, as being an hour anterior to the intimation, he now further *alleges*, That the assignee should be preferred in respect of his diligence, having insisted in this process in the cedent's name, and brought it to an act and the suspender's oath before the arresters appeared; so that, the intimation and arrestment being in one day, the preference must be in respect of the diligence, as was found in the case betwixt Pallat and Sydserf. The arrester opposes his interlocutor and his diligence, by a summons to make arrested goods forthcoming, in January 1656. The Commissioners, as formerly, preferred the arrester.

Dounie, Clerk.

Eodem die.

M ' K A L L Y *contra* R A M S A Y.

T H O M A S M ' K A L L Y, having charged David Ramsay of Turbane, for payment of a sum of L. 638, due first by bond, and, thereafter by decret, the said David suspends, and alleges that the bond is null, as being granted by a person interdicted, as was formerly found by the interlocutor of the 12th February 1658. It is *answered* for the charger, That the reason is not relevant upon the interdiction, but only to suspend it *quoad* real execution against the lands and heritable right of the granter of the bond within the shire of Linlithgow; but in respect executions against other lands and moveables, the interdiction is of no effects, but is like an inhibition. It is *answered* for the suspender, He opposes the interlocutor, and adds, that an interdiction, because of the weakness and facility of the party, renders him as minor, and the interdictor as curator; so that deeds done without their consent

consent is null. The Commissioners found the interdiction not to hinder personal execution, not against moveables, nor lands in any other shire, than where the interdiction was published.

Douzie, Clerk.

Eodem die.

C R A I G I N G A L T *contra* F E U A R S.

MR David Craigingalt, having a wadset of the lands of Tillicoultry, and being infest therein by the astricted multures thereof, pursues the feuars of the barony of Tillicoultry for the thirteenth curn of their corn and bear abstracted; which being intended before the Sheriff of Stirling, he, by interlocutor, repelled the defences, and granted a time to prove. The defenders have raised advocacy, which was produced to the Sheriff that same day of his interlocutor; and now *alledged*, That the matter being of intricacy, and inferring a perpetual thirlage for so great a duty. It was *answered* for the pursuer, That he is content to advocate, of consent, the cause being presently disputed; and in fortification replies, That he is infested in the mill with the astricted multures, and offers to prove, that it is the mill of the barony of Tillicoultry; and that, past memory of man, they have come to the mill, and paying such a duty, though it were never so long, which cannot be voluntarily without restriction. It was *answered* for the pursuer, That albeit use of coming, yet that will not infer restriction, it being the mill of the barony, and so long time paying multures relevant. The Commissioners found the libel and reply of being the mill of the barony, and the defenders within the barony, and forty years possession of the multures libelled, relevant to infer the thirlage.

Eodem die.

C L E R K *contra* R O B E R T S O N.

ANDREW ROBERTSON, being charged for payment of the sum of 1000 merks due by umquhile David Clerk, skipper in Burntisland, and Agnes Crawford his spouse, and that at the instance of Margaret Clerk his executrix; he suspends and *alleges*, That he had made payment to Agnes Crawford, relict of the said umquhile David, and obtained her discharge, which is sufficient; seeing the bond was conceived to the husband, and the longest liver of them two, and she survived; and so might lift the money. It was *answered* for the charger, *Non relevat*, seeing the wife, by that clause, was only liferenter, and could not have up the sum, but by a sentence, and the liferenter finding caution to make it forthcoming. It is *answered* for the suspender, No necessity of such caution. *2do*, There is the equivalent done, *viz.* a sufficient cautioner in the discharge. The Commissioners repelled the reason founded upon the relict's discharge, whom they found only liferenter.

Downy, Clerk.

February

February 18. 1758.

K E R *contra* Major B I G G A R.

MR ANDREW KER pursues Major Biggar, and others, for spuilzie of certain goods and corns belonging to the pursuer, and in his possession. It was *alleged* for the defender, *Absolutor*, because he offered him to prove, that the goods were lawfully poinded for Andrew Ker of Moriston, father to the said Mr Ker his debtor, and that they were in his possession upon his lands of Moriston, the time of the poinding. It was *answered* for the pursuer, That the alledgance is contrary to his libel, bearing, that the goods were his proper goods, and in his proper possession: Likeas, he produceth an instrument, and, conform thereto, offers him to prove, that Catharine Ker his sister, appeared at the poinding, and offered to make faith that the goods were his proper goods. It was *answered* for the defender, No respect to the offer to make faith of the said Katharine, because she is a woman, and wanted probation; and the privilege to detain goods from poinding is only competent to the owners, or others having expresse commission from them to make faith that they are theirs. *2do*, No respect to her offer, because the defender produceth an instrument, and, conform thereunto, offers them to prove, That the said Katharine offered to make faith, that the goods were her brother's goods, and their offer that the goods were her own goods. The Commissioners repelled the defence, in respect of the reply, as to wrongous intromission and restitution, and found that member of the duply relevant, to make faith of the various offers, to elide the spuilzie, and restrict the same to wrongous intromission; and granted a time to the pursuer to prove the quantity and prices, and a time for the defender to prove the said duply.

Dounie, Clerk.

*Eodem die.*E L L I E S *contra* the Earl of E G L I N G T O N.

MR JOHN ELLIES pursues the Earl of Eglington, as representing his father, for 8700 merks, conform to his father's bond, bearing that he should move, and cause the Earl Marischal, who was debtor in the sum, pay the same, or grant security therefor, otherwise should pay the same himself. It was *alleged* for the defender, *Absolutor*, Because, by the the Act of Grace, all sureties for forfeited persons are liberate, and therefore, the Earl Eglington being in effect surety for the Earl Marischal, who is forfeited, is free. It is *answered* for the pursuer, That the exception of the Act of Grace cannot quadrate to this case, seeing there are only meant sureties bound with and for forfeited persons; but this bond is an original simple bond, having not only an obligation of payment, but also an obligation *in facto* to cause the Earl Marischal grant security, which therefore cannot be a surety or accessory obligation, but a principal general obligation, and the said clause in the said act, being both dubious, and against the common law, ought not to be extended. It was *answered* for the defender, That he opposes the Act of Grace, not being cautioner, but surety for forfeited persons, to be free; which comprehends not only cautioners, but *ex promisso* who gave bond for others, and this bond bears for farther security. The Commissioners repelled the defence, and thought that clause was to be most strictly interpreted.

Dounie, Clerk.

February

February 23. 1658.

HAY contra the Earl of ERROL.

JOHAN HAY pursues the Earl of Errol, as heir to his good-fire, to make payment to him of the sum of L. 1000, borrowed by the pursuer from George Morison in 1616, for the Earl's use; in so far as the Earl, by his missive in 1615, desired the pursuer to borrow money, and employ it for his credit, and that the Earl, and his son, paid annualrent therefor to the said George Morison, and this Earl and his tutor likewise. It is *answered* for the defender, That his grandfather's letter is general, mentioning neither sum nor persons; and that his grandfather or father's acknowledgment of this to be their debt, can only be probable by discharges under their own hands, and not by their factors, without express warrants, or allowance in their accompts; and as for the defender's own payment, he was minor, and, and revoked; although he had not revoked, his tutor's payment cannot oblige him. The Commissioners found that member for payment of the annualrent by the umquhile chamberlains, or this Earl's chamberlain, not relevant, unless it were *alledged*, that the same was by warrant and allowance of the Earl or his father.

Donnie, Clerk.

Eodem die.

CARRIER contra LYELL.

GEORGE CARRIER pursues George Lyell, for a reduction of a bond, granted by him to Archibald Thomson, and assignation by Archibald to George, and of a decret of suspension following thereupon of the said bond. The reason against the bond is, minority and lesion, and the decret in consequence. It is *alledged* for the defender, That the reason of reduction is not relevant, because it is not *alledged*, that the summons of reduction was raised, and called, *inter annos utiles*, upon the pursuer's vocation. The Commissioners sustained the summons, and found the reason of reduction of the bond, and of the decret in consequence, relevant.

Donnie, Clerk.

Eodem die.

HAMILTON contra The Lord SOUTHESK.

DAAME MARGARET HAMILTON, relict of umquhile Sir John Stewart of Methven, and now spouse to Sir John Seton, having charged the Lord Southesk, as cautioner for the Duke of Lennox, for an annualrent, whereto she is provided by the Duke, of 4000 merks yearly, out of his lands of Methven, and others his lands, in lieu of a conjunct fee and terce, out of the estate of her umquhile husband. Southesk suspends on this reason, That the charger must allow the public burdens, conform to the act of parliament 1647, and that upon the consideration, she had accepted 3000 merks for her 4000 merks many years bygone. It is *answered* for the charger, That this provision is alimentary, and that there is no infeftment upon it, and that it is in lieu of a far greater provision due to her by her contract of marriage. The suspender opposes the act of parliament, whereby liferentrixes, renouncing their former provisions and infeftment, for a new annualrent of tack-duty, though they be not infeft thereupon, are liable to all public burdens, notwithstanding of the general clause of war-

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randice against all dangers and perils. The Commissioners found the pursuer liable to public burdens; but in respect of her condition, recommended the parties to agree moderately as to the quantities.

Brown, Clerk.

Eodem die.

Master of *ROLLO contra RUTHERFOORD.*

MASTER of Rollo pursues John Rutherford for reduction of a contract of copartnery, betwixt the defender and John Naesmith his father-in-law, whereby he disposed to him the equal half of all the ware in his shop, and an assignation to a bond, granted by James Naesmith to him, on this reason, That the same are made, and granted between confident persons in defraud of a pursuer, a lawful creditor to James Naesmith in 2000 merks. It is *answered* for the defender, That he opposes the contract of copartnery and assignation, bearing for sums of money, and onerous causes, and which cannot be taken away, otherwise than by writ, or the defender's oath, conform to the act of parliament 1621; and that he hath formerly deposed in a process, at the instance of Mr William Arthur, That the said onerous cause is true and real. It is *answered* for the pursuer, That no narrative between a good-father and a good-son can be sustained in prejudice of their creditors, unless it be instructed, especially the narrative of the contract of copartnery not bearing sums then received, but 1000 merks formerly due; which therefore the defender ought to condescend and instruct; which done, the pursuer offers to prove, that the same is satisfied by intermission with James Naesmith's goods, and there remained sufficient to pay to the pursuer; and as for the former oath, it is *inter alios actum*. The Commissioners ordained John Rutherford to condescend and instruct the cause onerous.

Donnie, Clerk.

Eodem die.

STEVENSON contra Tenants of JACKTOUN.

HOLMES STEVENSON, having apprised the lands of Jacktoun from George Clerk, as lawfully charged to enter heir to George Clerk his father, and being publicly infest thereupon, pursues the tenants for mails and duties, and John Miller. It is *alleged* for the defender, *Absolvitor*, Because he stands infest in the lands by umquhile John Clerk, long before the pursuer's right. It is *answered* for the pursuer, The defender's right is but base, and not clad with possession before the pursuer. *2do*, Though it were, it is affected with a back-bond, and the pursuer must have the supplies, over and above the defender's annualrent. It was *answered* for the defender, That his right was clad with possession by the back-tack, whereby the common author's possession became his possession. *2do*, The back-tack contains a clause irritant, which was committed, and, after which, the defender entered in possession. It is *answered* for the pursuer, Possession by the back-tack is not relevant, without payment of mails and duties conform. *2do*, The possession, after committing the clause irritant, *non relevat*, unless there had been a declarator, and the common author renounced or discharged the back-tack, before the pursuer's apprising. The Commissioners repelled the defence.

Donnie, Clerk.

February

February 24. 1658.

ELLINWORTH contra REDDY.

JOHN ELLINWORTH, pursues James Reddy for delivery of forty oxen, and for the prices libelled, bought by the pursuer from the defender, and whereupon he gave him earnest. It was *answered* for the defender, *Absolutor*, Because he had place to refile *re integra*, neither goods nor price being delivered, by doubling the earnest, which he was willing to do. *2do*, It is not libelled, that the pursuer required delivery of the goods *debito tempore*. It was *answered* for the pursuer, To the *first*, *Non relevat*, Because, by the agreement of the price, the bargain of sale is a compleat binding contract, and neither party may refile; and, by the custom of the nation, arles are only given for a symbol of solemnity of the perfecting of the bargain, that it may differ from an inclosed conjuncting, but not to import a power of refiling in the buyer by loosing, and in the seller by doubling his arles; which appeareth in this, that it is not regarded what the quantity thereof be; so that a boddle is as sufficient as an angel. To the *second*, The pursuer offered to prove, that he had required the defender, *debito tempore*, to deliver. It was *answered* for the defender, *Non relevat*, unless he had required by instruments; and the requisition was only probable *scripto vel juramento*. It was *answered* for the pursuer, That, in a matter of this import, it was probable *prout de jure*. The Commissioners repelled the first defence, and also the second, in respect of the reply, and found the same probable *prout de jure*.

ON the 24th February were the actions, Anna Rutherford against Symes; the Countess of Bramford against Whitebank; and Swinton against L. Wedderburn.

February 25. 1658.

RICHARD contra UDNEY, et e contra.

DAVID RICHARD, having pursued John Udney of that ilk, and being pursued by him in mutual contraventions, which were restricted to molestations, anent their rights and possessions of the hill of Southford; which the said John Udney craves to be declared his property, and part of his barony of Newburgh, by doing all goods of property thereof; and the said David Richard insisting, for declaring that he was infeft in his land of —, and, by virtue thereof, was 40 years in possession, peaceably, in the commonty of the said hill. In this process, there was a decret of cognition before the sheriff of Aberdeen, finding Auchvant to have commonty in the muir, and decerning Udney not to appropriate the same. Both parties having now adduced probation, Udney proves the hill to be part and pertinent of his land, and David Richard proved himself, and his author, to have commonty therein; but upon the probation, the question was raised, Whether he should have only right to the commonty of the pasturage, or also right to the casting of seal and divot? in respect, that the witnesses adduced for him, proved, that he had peaceable possession of pasturage, but was always interrupted in casting and carrying away of seal and divot. Whereanent it was *alledged* for Auchvant, That seeing it was proven, that he had right of pasturage, his right to seal and divot was *ipso facto* proven; because, by the nature of servitudes, and the custom of the nation, as is expressed by Craig, the greater servitude includes always the lesser; and so pasturage necessarily includes seal and

and divot. It was *answered* for Udney, That though that be an ordinary case in servitudes, yet this is also ordinary, that servitudes introduced by use and custom are regulated thereby, and to be extended no farther; so that, in lands where there are mutual rights of common, and neither hath the property, pasturage would include seal and divot, being alike to all; but here Udney having proven his right of property, and Auchvant's right of common being only constitute by use, could not be extended beyond that use. The Commissioners found, by the depositions of the witnesses, that Auchvant had proven him to be in peaceable possession of pasturage; and therefore declared him to have right to common pasturage, and not to seal and divot.

Downie, Clerk.

February 26. 1658.

REIDS *contra* FEUERS of LESMUIR.

JOHN REID of Ballochmill, and John Reid of Daldilling, pursue the feuars of Lesmuir for the multures of Lethem in Myke. It was now further *alleged*, That the pursuers infestment could not import a thirlage upon the defenders, because the one of them bore only the thirle multures of the half mail of Katharine and Daldilling, and it was not offered to be proven, that the lands libelled were within these half mails. 2^{do}, The pursuers charter was null, as being granted by the Laird of Loudon, and not confirmed. 3^{tio}, The pursuers infestment cannot thirle the defenders lands, farther than the defenders own infestments produced bear, which are anterior to the pursuers infestment of the mill; but the defenders infestments bear them only to be thirled to the millers of Mauchlin, whereof there are four; after which their superior, nor no other but themselves, could ever make the servitude of thirlage more burdensome, by restricting that to one particular mill of the four, but they must still have their option. It was *answered* for the pursuers, To the *first*, That though Daldilling's infestment of his half expressed only half-mails, yet Ballochmill his infestment of the other half, expressed particularly lands, which being by that same author, and taken jointly, did prove, that the half-merks did comprehend the particular lands libelled. To the *second* and *third*, It was *answered*, 1^{mo}, That the meaning of the clause of thirlage in the defenders *reddendo*, to come to the mill of Mauchlin, was not to give them an option, else it would have been expressed to any of the mills they would have pleased; but because the Abbot of Melrose did not particularly know to which mill Ewfyland was thirled; and therefore took them in the general restricted to the mill of Mauchlin, which must be understood to the mills that they were formerly thirled to; seeing the four mills had distinct thirles by several tacks, whereof the pursuers produce their own tack of this mill, and the thirle thereof: And if the meaning were otherwise, it would make the pursuers and the other infestments of all the four mills elusory; seeing to be thirled to one of four, is to be restricted to none. 3^{tio}, The locality of division of the thirle was in the power of the Abbot, who had divided: Likeas the defenders have acquiesced thereunto; because it is offered to be proven, that they and their predecessors came to this mill, and paid in such multure and mill-service these 40 years, which is more than sufficient to prove and clear the restriction to be particular to this mill: And, whereas it is *alleged*, That the pursuers charter is not confirmed, and so null, it is *answered*, Albeit there are null infestments, yet seeing thirlage may be constitute by the bonds,

bonds, without infestments, the charter, though not confirmed, is much more. The Commissioners, in respect of the reply of the long possession, repelled the defences.

Dounie, Clerk.

Eodem die.

CHILDREN of EDMONSTON of WOLLMET contra
MARK KER.

THE seven children of Patrick Edmonston of Wollmet pursue Mark Ker, to hear and see it found and declared, that his lands disposed to him by his father, or his lands and bonds is taken in his name from any other person, after his father accepted a tutory or factory from their father, empowering him to intromit with the coal of Wollmet, for the use of the children, conform to a tack granted to them, which he accepted in March 1644, and, by virtue thereof, he was now decerned to pay the sum of 34,000 merks to them, ought to be found liable for that sum, by apprising, or otherwise; because, it behoved to be presumed, that the defender, being unmarried, and in his father's family, having no calling nor employment, could have his means nowhere else, but from his father; which, being after the contracting of the debt, behoved to be liable thereto. It was *answered* for the defender, That this process was a great novelty, and no way relevant to take away the defender's heritable right and infestment upon a presumption; and any ground, that such a process had in law, is upon the act 1621, against bankrupts; which ought to have been by reduction: And the manner of probation of the fraud and conveyance betwixt confident persons after the contracting of the debts, is there determined only by writ or oath of party, but not by any presumption; seeing no person is obliged to show the way and means of acquiring of his lands. It was *answered* for the pursuers, That their libel is most relevant, and as there are new frauds, so there must be new forms; for, if the pursuers were only to make the lands, disposed only by the defender's father to him, liable, they might reduce the same, and the lands would return to the father, and might be affected for his debt: But where the father, by his means, took the right originally in the name of his son, the heir, a reduction would not make a right to return to the father: it behoved to be declared, that though the lands might be affected as if they were the father's: and as to the manner of probation in the act of parliament, it was only expressed as is ordinary, to exclude witness to prove, but not to exclude so pregnant a presumption, being an argument convincing from reason; for if a father, after a debt contracted, should dispose to a dumb man or an infant, it were absurd to alledge, that such dispositions were not reducible, because the party could not swear; and therefore, this presumption behoved *transfirationis probandi*; and to prove the dispositions to have been by the defender's father's means, unless the contrary were proven, *viz.* that the defender had means to acquire these lands, equivalent to the worth thereof. The Commissioners found the libel relevant to make the lands and bonds in the defender's person, after contracting of the debt, liable, in so far as he should not condescend, or instruct either by writ, adminicle, or witnesses, that he had means *aliunde*, to acquire the lands; which they declared should affect the lands in the first place, and the pursuers debt to be next; and, having considered the defender's condescendence, and adminicles, found him to have L. 1000 Sterling

ling of his own, and found the superplus of the land affected with the pursuers debt.

Brown, Clerk.

June 3. 1658.

F R A Z E R *contra* M ' K E N Z I E.

JOHN FRASER, as heir and executor to his goodfire, pursues Alexander M'Kenzie of Suddy, as heir to his good-fire, for payment of two sums; in which process the defender advocates, having passed from the compareance, litiscontestation was made *contra absentis*, and a time assigned the pursuer to prove, who chused to prove by the defender's oath; and having cited him personally for that effect, did, upon the diligence, crave him to be holden as confessed. It was *alleged* for the defender, who again compareed, That he ought to have a sight of the diligence, and execution, to know whether he was personally apprehended by a messenger. *2do*, Offered yet to take a day to produce the defender. It was *answered* for the pursuer, That after litiscontestation against the defender absent, he could not now see any act of diligence; and tho' compareance was now made for him, yet he could not have a day to produce him, but he behoves either to depone or be holden as confessed summarily; for the benefit of a day to produce the defender, is only competent before litiscontestation. The Commissioners held the defender as confessed; but, if he compareed betwixt and the fifth day of June, ordained him to be accepted to depone.

Downie, Clerk.

Eodem die.

R O B *contra* S T E W A R T.

AN action for damage and interest, *ad leges Aquiliae, cap. 1.* The case was, Stewart the defender having a flock of she-goats, and the pursuer's buck, at unseasonable times, often riding his goats to his prejudice, he castrates the pursuer's buck; and being conveyened for the damage done to the pursuer by libbing of his buck, in so far as his buck being disabled to ride the she-goats in his flock, he was damnified, besides the loss of the buck, in the brood of his goats and kids, and their milkness so many years. *Excepted*, The libel is noways relevant, in so far as concerns damages and interest, because the defender could be in no worse case than if he had killed the buck; for if he had killed him, he could only in law be made liable for his price. The Commissioners sustained the summons, as it was conceived, both for damage and interest, and deterioration of the buck, reserving the modification to themselves. Then *alleged*, That not only, on that consideration, had he castrate him, but that, immediately thereafter, *debito tempore*, before riding-time, he advertised the pursuer of his castration, to the effect he might provide himself of another buck for riding his goats. This was found relevant, and a day assigned to prove it.

AR. Oliphant.

Alt. Fletcher.

June 9. 1658.

H O M E *contra* the Earl of G A L L O W A Y.

GRISSEL HOME, daughter to unquhile John Home of Sorbey, pursues the Earl of Galloway, for reduction of an apprising, of the lands of Sorbey,

bey, led at his instance. Her title is, That, by her father's contract of marriage, the lands of Sorbey are provided to the heirs of marriage; which failing, to his heirs-male whatsoever, with this provision, That, because the daughters, or heirs-female of the marriage, will be debarred from succession; therefore obligeth him and his forefairs, and his heir-male, to pay to them 6000 merks. It was *alleged* for the defender, No process, because the only meaning of the clause can be, that, in case that the daughters of the marriage should be debarred, and a stranger, heir of line, should succeed, that they might have this provision; but noways, that if the heir-male of the marriage should succeed, they should have this provision, because the heir of the marriage did not debar them by the tailzie, but by this common law as being heir of line; but so it was, that there was an heir-male of the marriage who survived the father, and possessed the estate. It was *answered* for the pursuer, *first*, That she opposed the clause, bearing, that if the heirs-male did succeed without distinction, whether they were heirs of the marriage, or not, that they should pay this sum to the daughters of the heirs-female. *2do*, Though that were the meaning of the clause, yet it was not relevant to allege, that there was a son surviving and possessing, unless that he had been actually heir entered; especially, seeing the truth is, he was only an infant of eight years old, and died within two years after his father, and was never served, nor infeft. It was *answered* for the defender, That, in such cases, heirs are understood of those who might be heirs, though they actually entered not, as in the case, that another should renew, if there were not heirs of the marriage, the condition exists not, if there be a child procreat, at least surviving, though not entering. The Commissioners repelled the defence, and found process.

Downy, Clerk.

Eodem die.

H U N T E R *contra* E L L I E S.

MR WILLIAM HUNTER, as executor to David Hunter, pursues Mr John Ellies, for making certain sums of money forthcoming, arrested in his hands, as belonging to Sir William Balfour, upon a decret of registration, recovered at the pursuer's instance, against Sir William, being absent. It was *alleged* for the defender, No process, because the decret of registration, the ground of all, is, *ipso jure*, null; and as wanting probation, in so far as, by the bond registrate, the sum is only payable after the death of certain persons therein named; and yet decret of registration is pronounced without probation, that they were dead. It was *answered* for the pursuer, That this, being a decret of registration, there was no necessity to prove the death of the said persons; because, as in the life of the creditor, he would have got sooner registration upon that bond, notwithstanding of the said clause, which only could be made use of by way of suspension *contra* execution; so now, in the same way of registration, ought to be granted by way of action; and therefore the defender ought to have suspended or reduced, if he would quarrel the decret; especially seeing, if the defender would allege, that they were yet on life, the pursuer should find it relevant of consent; but it is notour they died long before the decret. The Commissioners repelled the defence, and found process.

Balfour, Clerk.

June

June 10. 1658.

B R O W N *contra* R A M S A Y.

MR David Brown, having charged Mr John Ramsay, upon a decret recovered against him, as heir to umquhile James Ramsay his father, for payment of certain bonds due by his father; the said John suspends, and raised reduction on this reason, That these debts were satisfied by Robert Mitchelson the suspender's tutor out of his estate; but, instead of taking discharges, he took assignation, in the name of William Ker, to his own behoof, who transferred the same to Mr David Brown; which fraud he offered to prove by witnesses above all exception: And to evidence there was fraud, he produced a testificate from the tutor, that he had paid one of the sums, and others from some of the creditors, that they were paid of others by him, and from Mr David Brown, son-in-law to the tutor, and could condescend upon no onerous cause of his translation, or evidence thereof. It was *answered* for the charger, That his translation, being a writ, could not be taken away by the oath of his cedent, or by witnesses; and so the oath of the said parties do not prove, much less can their emendicate testificates: And whatever the tutor had done, it was competent for the suspender to pursue him, and his heirs. The Commissioners, before answer, ordained the charger to condescend upon the onerous cause of his translation, that they may consider upon the probability thereof.

June 11. 1658.

S I M S O N *contra* L I D D E L.

SIMSON pursues Liddel for reduction of a contract of marriage, whereby the defender's father did dispoise his whole lands to his son, in contemplation of the marriage, as being a disposition between conjunct and confident persons, without a just price, or equivalent cause onerous, in prejudice of lawful creditors, conform to the act of parliament 1621. It is *answered* for the defender, That the reason is not relevant against this contract of marriage, because it is no fraudulent disposition, but most favourable and necessary: And it is not alledged that the dispoiser was then bankrupt, or that any diligence was done against him, whereby he or his son might be put *in mala fide*; much less the stranger's contract in marriage with him, and who gave a competent tocher, viz. 5400 merks more than equivalent to the land, not exceeding five chalders of victual: And if the pursuer had used diligence, either before the marriage, the same would not have gone on, or at least before payment of the tocher, whereby they might have been paid; but, being all this while silent, it is against law and reason to crave the contract to be reduced. It was *answered* for the pursuer, That his reason of reduction stands most relevant, notwithstanding of the answer; because both the intent, and the express tenor of the act of parliament, is for annulling all dispositions, without an equivalent cause, in prejudice of creditors; in which statutory act there is no mention of bankrupts, or deceit and fraud; and there is no ground of exception of contracts of marriage, more than others; but, on the contrary, these are the more ordinary ways that fathers dispoise their estates to their sons: Neither was there any obligation upon the pursuer to take notice of the proclamation of parties; but whensoever he may reduce the disposition, in so far as concerns the fee of the lands; but as for the liferent provided to the wife, they were not to quarrel. The Commissioners

Commissioners found the reason relevant, that the lands disposed did far exceed the tocher paid to the disponent, to reduce the same; in so far as the worth of the lands exceeded that sum. It was further *alleged*, That albeit the only cause onerous expressed in the contract was the tocher, yet the same ought also to retain the right of the lands, ay and while he be relieved of certain caution he stood engaged in for his father before the contract; and which he had paid: Because, the intent of the act of parliament being for eviting fraud, and prejudice of lawful creditors, that ground doth not reach to this disposition, in so far as it is instructed, and doth ascribe to any other debt. *2do*, If the son had not got this disposition *bona fide*, he might and would have affected the lands with a debt; and therefore, seeing there was no fraud, the disposition ought to stand to him in lieu of diligence, seeing he could do no diligence against himself. It was *answered* for the pursuer, That the alledgeance is not relevant, unless it were offered to be proven by writ, or the pursuer's oath, that the disposition was not only granted in contemplation of the marriage, but also for relief of the said other sons; and the act of parliament annulleth all such, unless there were an equivalent onerous cause: So that relief must be proven to have been the cause, and that the defender would not do diligence against himself; *first*, It was his own fault that he took such disposition, and did not express that other cause, which he might have done. *2do*, That he might have caused the creditors, to whom he was engaged, apprise the right from his father and himself both, and that ordinary remedy is yet competent to him; and therefore as to that ordinary relief, he is but in the case of another creditor, and must use diligence. The Commissioners adhered to their former interlocutor, and left both parties to their diligence, to affect the lands for their payment and relief.

Brown, Clerk.

June 12. 1658.

R U T H E R F O O R D S *contra* their T U T O R.

R U T H E R F O O R D S having pursued Hunthill their tutor for an accompt; it was *alleged* for the defender, No process, because all the ground they had libelled, or produced to make him tutor, was, That he was nominate in their father's testament, and that when the testament was confirmed, he compared, judicially accepted, and made faith; which can be no sufficient title or proof against him, being but the assertion of the Commissary-clerk; and so no more in this case than the assertion of a notary; for nothing but an act of process subscribed by the clerk, by virtue of his office, and as a proper act of that court, will bind and prove against parties, without their own subscription; so an act of caution will not bind, though subscribed by the clerk, without the parties: But the accepting of a tutory-testamentor is an act altogether extraneous to the Commissaries or their clerk, and wherein their office is not concerned; neither is it at all the custom of tutors-testamentors to compare before Commissaries, and to accept and make faith; but their custom is, if they accept, they act, and their acting is their acceptance; and they are not bound to renounce, if they simply forbear. *2do*, Though that were an acceptance, yet seeing the tutor forbears to act, he ought in that case to have *beneficium ordinis*, that the other tutors who administrate, and their heirs, who are *solvendo*, might be discussed in this same way as if they were curators; as was found in the case Livingston *contra* Livingston. It was *answered* for the pursuers, To the *first*, That they opposed the decret of confirmation,

firmation, which cannot be but a sufficient proof, seeing it hath an adminicle, *viz.* the nomination and the testament; and whatever hath been the custom of tutors, it cannot be denied, that this is a most compleat way to accept, and that a decreet must prove without a subscription, as well as in the acceptance of renouncing of executors, and at the time of this acceptance, being more than forty years since, there was no custom even of subscribing acts of caution, but only they compearing judicially, the act proved against them. To the *second*, by the law of Scotland, all tutors are liable *in solidum*, and they have no benefit of discussing or division: And to the practise and parallel of curators, it meets not; for there the minors had named themselves curators with a quorum, and the deeds done, were done by the minors and a quorum of their curators: And so the other not administering was freed, because he could neither know nor prevent what the rest did, being sufficiently authorized; and there was no possibility of recovery, after the deeds were so done. So that it being free for the minors to elect curators, and to appoint the condition of their administration, it meets this case, where there is no such quorum. The Commissioners repelled both the defences, and ordained the compt to proceed.

June 15. 1658.

Lady CLARKINGTON *contra* her SON and TENANTS.

LADY Clarkington pursues her son and the tenants of the Mains of Clarkington for poinding of the ground, for annualrent provided to her by her contract of marriage. It was *alleged* for the tenants, That they deny they are tenants, and so that must be proven, especially seeing they are designed as dwelling in other lands. *2do*, That member of the libel is not relevant, inferring a personal conclusion to pay, which is not competent in this real action. *3tio*, The poinding must be restricted unto the ordinary payment of their mails and duties, and not to poind all their goods without limitation. It is *answered* for the pursuer, To the *first*, She pursues the defenders as tenants or possessors, and, if they be not such, there will no prejudice ensue to them; and therefore it was never accustomed, that, in a poinding of the ground against parties, whether absent or present, it should be proven that they were tenants and possessors; otherways it will be a common exception that will bar all poinding. As to the *second*, It was *alleged* to be the common stile, and that it hath been oftentimes found, that tenants have been decerned personally for payment of an annualrent. As to the *third*, It is contrary to the nature of the poinding of the ground, to restrict to mails and duties. The Commissioners repelled the first defence, but sustained the second defence against the libel as is libelled, which bore, that letters of horning should pass, upon six days, against the tenants for payment, which is clearly informal; and so the question, Whether they might be decerned, being formerly pursued, to make payment simply? As to the *third*, resolved to hear it in their own presence.

June 17. 1658.

MOWAT *contra* LEARMONT.

MOWAT, having obtained decreet against Joseph Learmont, to make the sum of ——— forthcoming to him, arrested in his hands as belonging to one Learmont, who had sold his lands to the pursuer; and he being charged, suspends

suspends on this reason, That the charger had possession of his lands, upon an infestment granted to him therefor, and had also reduced a right made to this defender *ex capite inhibitionis*; and so being infest in his lands for the same sum, and reduced other rights thereof, he cannot return to arrestment, and charge him for the sum. *Answered*, Any infestment he had was but for security of his money: As for the reduction, that was with reservation to the defender of his reduction of the inhibition, the ground of that reduction, and which reduction and infestment he is willing now to renounce, he being paid off this sum. *Alledged*, he could not renounce *post sententiam*, being *contractus judicialis*, even though *res* was *integra*, and though it was a benefit introduced in his favours allenarly.

Eodem die.

P A T O N *contra* C U N N I N G H A M.

CUNNINGHAM having given commission to Paton to buy some ware; and the ware being bought accordingly and delivered, he is pursued to pay the prices thereof. The commission being produced, the question was *de modo probandi*, whether it may be proven *prout de jure* or not? Contended, the matter being delivery of ware, now after six or seven years, could not by the act of parliament be proven, but *scripto vel juramento*. *Answered*, That the act of prescription is of debts, which could not be proven by writ; but here the debt being founded upon writ, *viz.* the commission, it cannot fall under that act. *Answered*, The commission written did not found the obligation, but only the delivery, which is *factum*.

Eodem die.

— *contra* —

A Naked promise, *ubi nulla subest causa*, can be no ground of an action of debt; just as in the civil law, *pactum nudum non parit actionem, sed tantum exceptionem*; and with us not only the promise of payment, but also the cause of the promise must be proven, *secus nullam sententiam*. They found also a promise to pay L. 300 probable *prout de jure*, because of the promise being obvious to sense, *viz.* L. 100 yearly for fee of bigging, &c.

June 19. 1658.

L I V I N G S T O N *contra* Lord B O Y D.

MARGARET LIVINGSTON, having right, by progress, to a bond granted by umquhile Robert Lord Boyd to Sir William Dick, and to a decret obtained against umquhile James Lord Boyd as heir to Robert, obtained also decret against William now Lord Boyd as heir to James; he suspended, and raised reduction upon this reason, That the first bond, granted by umquhile Robert Lord Boyd, was null, as being granted by him then minor, as having curators, without their consent; and therefore the same, with the decreets following thereupon, ought to be reduced. It was *answered* for the charger, That the reason was not relevant, unless lesion were alleged, and that, *inter annos utiles*, there had been revocation made, and reduction intended. *2do*, The reason upon minority is not relevant in this case, because the bond was granted by my Lord Boyd *major proximus*, and who was a member of parliament, of country, and of the army; so that
it

it were absurd to crave restitution, because of his levity, as not fit to manage his own affairs, who managed the affairs of this nation. It was *answered* for the suspender, That his reason stands most relevant: And as to the first, he is not now pursuing upon minority and lesion, as craving restitution, which he might do, though his curators had authorised him; but this is a general reason, *viz.* That he had curators, who consented not, whereby the deed is null, without necessity of alledging lesion, revocation or reduction: And though, if the charger would alledge, that the minor was *locupletior factus*, it might be sustained upon that ground, that he needs not either alledge or prove lesion; seeing, by the law, minors, by choosing curators, become as majors, interdicted, and bound up to the consent of curators, without which their deeds are null. To the *second*, proximity to majority is not relevant, unless there had been fraud concealing the majority, which is not here, and, being one of many having power to vote in a State, cannot infer a sufficiency to manage affairs alone. The Commissioners found the reason of reduction and suspension relevant to annul the bond and decreets, notwithstanding of the answer.

Eodem die.

HALTBURTON *contra* HASSWALL.

THOMAS HALYBURTON pursues John Hasswall for payment of L. 96, which was addebted by the defender's umquhile brother, and whereof he promised to make payment. It was *alleged* for the defender, That the promise was only probable *scripto vel juramento*, and that it was so commonly accustomed in the courts of Edinburgh, and other courts of the nation, where petty sums were most frequent; and upon this reason, because promises uttered only by word, where there was no bargain, or thing delivered interveening, that might fall under sense, might readily be mistaken and forgotten by witnesses, on what time such promises were made, and might also be readily performed, when there were no witnesses to prove performance; and therefore in the same process, by interlocutor, it was first found, that the promise by libel of L. 100 was only probable *scripto vel juramento*. It was *answered* for the pursuer, That his libel is relevant to be proven *prout de jure*; for seeing, by common law, witnesses might prove any thing, and that there is a particular act of parliament, limiting the same, that witnesses shall not be admitted in matters of importance, which are declared to be L. 100, and above there is neither law nor custom of the Lords to restrict it in matters of less importance; and therefore, though the Commissioners found the L. 100 so probable by writ or oath, the pursuer did no wrong to cut his libel, and libel a less sum, which now had been already found to be probable *prout de jure*. The Commissioners found the libel relevant to be proven *prout de jure*.

Eodem die.

DOUGLAS *contra* DOUGLAS.

RICHARD DOUGLAS, having right from umquhile Richard Douglas, to a bond granted by umquhile Laird of Cavers, to the said Richard's son, for 200 merks yearly during his life, he obtained decret before the sheriff of Roxburgh thereupon, against Sir Archibald Douglas, now of Cavers, as son and heir to his father. Sir Archibald compearing, raiseth suspension
and

and reduction, and alledges compensation of a sum, to which he was assignee, due by umquhile Richard Douglas the cedent. It was *answered* for the charger, *first*, That this reason was competent and omitted. *2do*, That it was not relevant, seeing the debt craved to be compensated was contracted long after the pursuer's right, and so there could be no compensation, much less after sentence, contrary to the act of parliament. It was *answered* for the suspender, To the *first*, That competent and omitted is not relevant before inferior courts, except it were *doloſo*, omitted of purpose to delay; for where the procurators are ordinarily ignorant, it would be of very ill consequence, that what they omitted by ignorance *sine dolo partis*, should never be receivable; for then, for that hazard no defender would compear before an inferior court, to defend, but be absent, and suspend; and so to make all inferior courts useles: And therefore, this compensation, being of a very ticklish matter, there could be fraud presumed. To the *second*, The charger's right, though it were a formal assignation, could not exclude compensation upon a debt due by the cedent, though after the assignation, being before intimation, which only denudes this cedent. *2do*, The charger's right is not an assignation, but is a testament, as it expressly bears, at least, a legacy, or *donatio mortis causa*; bearing a disposition of all the defunct's goods, and nomination of his heir, in case he returned not to the country out of which he was then going, but died; with an express provision thereof to him, to uplift and dispose thereof, any time during his life: And therefore, though it had been intimated, yet the property stood in the person of the defunct all his life; and therefore, any debt contracted by him, any time thereafter, might compensate: And it were against law or reason, that the charger should enjoy his whole means, and not allow and satisfy his debt. The Commissioners sustained the reason, notwithstanding of the answers.

June 20. 1758.

Lord B O Y D *contra* L I V I N G S T O N.

IN a reduction pursued by my Lord Boyd against Livingston, found, that a bond granted by a minor having carators, *sine eorum consensu*, was null; and that a minor might reduce the same *quocunque tempore etiam post annos utiles*.

Aët. Gilmer.

Alt. Gilmer.

Eodem die.

N A E S M I T H *contra* J E F F R A Y.

IN the pursuit Barbara Naesmith against Provost Jeffray, found, that a letter written by the pursuer's husband *in præcinctu* to her, wherein he says, (As for any thing we have, I think you well worthy of it), which carries the force of a military testament, and the legacy to be universal. *Item*, found, that the relict, by her contract of marriage, renouncing the third part of the moveables, could not claim as an universal legacy the dead's third of the moveables, and the relict's third renounced by contract of marriage, as said is; but that the moveables behoved to divide into two parts, the one half thereof could only be legate by the defunct to his wife. *Item*, found, that where there is a particular legacy left, and also an universal, the particular is preferred to the universal, and must be first paid off.

Aët. Gilmer.

Alt. Gilmer.

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June

June 22. 1658.

MARION ANDERSON *contra* CATHRINE THOMSON.

MARION ANDERSON, pursues Cathrine Thomson, as heir to umquhile John Thomson, for fulfilling to her of the contract past betwixt the said umquhile John Thomson and the pursuer; and especially that article thereof, whereby it is provided, That, in case it shall happen the said John Thomson and Margaret Anderson to depart this life, without heirs procreate of their own body, that then his heir shall be obliged to make forthcoming to her heirs the sum of 2000 merks of the tocher, and half of the conquest. It is *answered* for the defender, *Absolvitor*, because she offers her to prove, that there were heirs of the marriage who survived the father; which though now dead, makes the condition not to have been existant. It is *answered* for the pursuer, That she opposes the clause of the contract, whereby it is provided, That in case it shall happen that the said John Thomson and Margaret Anderson depart this life without heirs; and therefore, unless the heir had survived them both, the condition was existant, and the mind of the parties was, that the tocher should return. The Commissioners found the defence relevant, that there was a bairn procreated of the marriage, who survived the father, though he survived not the mother.

Brown, Clerk.

Eodem die.

Sir THOMAS NICOLSON of CARNOCK, *contra* the Laird of PHILORTH.

SIR THOMAS NICOLSON of Carnock, as heir to his father, pursues the Laird of Philorth, as successor *lucrative* to his grandfather in his lands of Philorth, and others, for payment of the sum of 10000 merks, wherein the defender's grandfather was cautioner for the Earl Marishal. It is *alleged* for the defender, No process, because the Earl Marishal is a forfeited person; and, by the act of grace, the creditors of such persons must clear their debts out of their estates, otherways they are discharged, both as to principal and cautioner; and if they claim the debts, it is to be satisfied by such ways as are prescribed by the act allenary; and if not, out of the principal estate; and so in both cases the cautioner is free; and likewise, by the act of restitution, there is a time granted before the cautioner can be distressed. It is *answered* for the pursuer, to the first, That the defender's predecessor was not cautioner for the defender, but for the umquhile Earl Marishal, who was never forfeit; and so the act of grace and of restitution meets not that clause. *2do*, The pursuer, as heir, to establish the debt against the defender *passive*, as representing his grandfather; and he is content the provisions contained in the act of restitution be allowed to the defender, and inserted in the decret. It was *answered* for the defender, to the first, That he opposes the act of grace, whereby all the debts of forfeit persons, whether they be their own proper debts, or their predecessors, are appointed to be paid out of their own estates only, and their predecessor's cautioner is their own cautioner, as well as the heir of the cautioner is their cautioner. To the *second*, Seeing the defender hath a lawful defence to bear process, he cannot be forced to suffer decret to pass against him with any conditions. The Commissioners repelled the defence, in respect of the pursuer's reply, and offer to take his sentence with the provisions contained in the act of restitution.

June

June 23. 1658.

Sir ARCHIBALD DOUGLAS of CAVERS *contra* the
Countess of BUCCLEUGH.

SIR ARCHIBALD DOUGLAS of Cavers, as having right by infestment to the kirk and teinds of Cavers, pursues the Countess of Buccleugh for spuilzie of the teinds of her lands of that parish, and meddled with by her after inhibition, and restricted the same to wrongous intronission. It was *alledged* for the defender, *Absolvitor*, because, by a contract produced betwixt the pursuer's predecessor and her, bearing that Cavers had right, by infestment to the teinds of that parish, and that the Earl of Buccleugh had right to a tack granted by the Abbot of Melrose, of the teinds of that parish for three lives and three nineteen years; the Earl granted assignation to Cavers of that tack, in so far as concerned the sheriff's own land, for which Cavers was obliged to pay 50 merks of tack-duty, being the proportion of the Earl's own lands; whereby the pursuer's predecessor hath acknowledged and homologate the defender's predecessor's right by the said tack, which is not yet expired, and hath possessed his own teinds these 37 years by that right; and so cannot now quarrel the defender's right, contrary to his express acknowledgement and homologation. It was *answered* for the pursuer, That the defence ought to be repelled, *first*, because, in law and reason, the taking of right from any party doth not so acknowledge and homologate the party's right, but that the taker may clothe himself with his own right, as *conducens rem suam potest uti jure proprio, lib. 20. Cod. de conjuncto*. And, by our law, though a tenant, getting possession from any party, can neither make use of any right of his own, or of any other acquired right, to debar his master from recovering possession *in judicio possessorio*; yet he hath quit possession *in petitorio*, he may pursue that party upon any other right; as is Craig's express opinion. *2do*, All the acknowledgement that ever there was a tack of the aforesaid *in durante*, is only in the narrative of the contract, in which *non creditur referenti nisi constet de relato*; and narratives do not prove, unless the thing narrated be otherways instructed; and therefore this relation can never prove that such a tack was, unless the tack be produced. *3tio*, Though the pursuer's homologation were in its own nature exclusive of any quarrel, yet where the person homologating has a power *lapsus*, or by error or mistake hath taken a right from a person who had no right, that can never make him to have a right; *nam nihil tam contrarium consensui quam error*. But here Cavers was in an error, and mistaken in this narrative, in respect that the word *narrative* in that part cannot be conceived to be his words, but Buccleugh's words: And it is ordinary, upon information of parties, for writers to deduce rights without seeing of them; and the error is clear, because it is acknowledged there is a tack of that same date, by that same Abbot, for some liferents and two nineteen years, which is now expired; and it must be presumed a mistake, unless another tack than that be shewn; for it was neither necessary, nor accustomed to take many tacks of one date, nor of indifferent indurances, and, by contract, the Earl is obliged to exhibit the tack judicially, and to grant a transumpt; by all which the error is clear. *4to*, Although the homologation were relevant and no error, yet it can homologate no farther than the right granted and accepted extends to, which was only a right to Cavers's teind of his own lands, which cannot hinder him to quarrel the Earl's right as to the teind of the Earl's lands, more than if a person disposing a barony, and relating in his disposition, that he had right by that in his charter to another barony, would exclude the purchaser to quarrel

quarrel the right of that other barony. It was *answered* for the defender, That her defence stands yet most relevant notwithstanding the answer; for to the first, The civil law in this point is derogate and opposite to the law and custom of this nation, wherein homologation of a right by taking tack, or otherways, hath ever been an unquestionable defence: and as to Craig's opinion, though a tenant might make use of an acquired or supervenient right, after he took his tack *in petitorio*, because he could not be conceived to pass from that right by his taking the tack, seeing he then had it not; yet if when he took the tack, he had that right, and in the tack by contract related that right, and yet acknowledged the other party's right, as the case is here, he could never come in the contrary. As to the *second*, Though narratives prove not for a narrator, or against others, yet that a narrative should not prove against a narrator, it was never heard; but here the narrative is passive, and not related as any one party, but by a common relation and acknowledgement of both, bearing "For as much as there was such a tack, of such a term." And as for the tack itself, through the length and trouble of time, and the minority of his lady and father, it cannot be found; and it was much by accident, that this contract was found of the Register; but seeing it is expressly acknowledged by Cavers subscribing, that it was, he can never now alledge that it was not. To the *third*, It was no way competent by reply; and if this were, a reduction *errore lapsus* was never found relevant in this nation, but only *dolis circumventis*; for if any party err, without the fraud and circumvention of the other party, that can never annul the contract, else few or no contracts in Scotland would stand, wherein there is always some error, and expressly supposititious narratives are ordinarily in writs, as in bonds of borrowed money, where there are more gratitudes or good deeds, where there were none. And as to the grounds whereupon error is here inferred, they are not relevant; for the contract relates most particularly the whole tenor of the tack; and though it might have been without showing of the tack, it will not conclude that it was so; neither will that conclude, that because the Earl was obliged to exhibit the tack judicially, therefore he shewed it not at the contract; neither concludes it, because there was another tack of the same date of a shorter endurance, that therefore the express acknowledgement of another tack of a longer endurance could be a mistake; it being but ordinary at the time to take tacks of divers endurances, that if one were miscarried or invalid, the other might hold: So that, whatever might be alledged in manifest error *in substantialibus et causa contractus*, yet upon such presumptions it were most unreasonable. To the *fourth*, The homologation of one individual right doth homologate the whole right; though, by taking of a right but to a part of it, because what *approbo non reprobo*; and it is impossible to one party, both to assent to a party's right, and to dissent from the right *in eodem jure*; for though it might be argued in the instance proponed of the second barony, if the acceptor of the rights to one, did expressly acknowledge as heir, that the disponent had right to both, he could not come against his own subscription; yet the case is not alike; for there are two several rights only joined in one writ: So that, expressly, the one might be acknowledged, and the other disallowed; but if the purchaser took a right to lands as a part of the barony, and did dispo-
 pone his right to that barony, he could never come to quarrel the right of the whole barony; seeing by that individual part, he bruik'd that right, and behoved both to pursue and defend; and there is such difference also, that such an error might be made clear and certain, because, by the Records, it might be evident, whether the disponent had right to two baronies, or but one; but in this case the tack relieved, neither was, nor needed to
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be registrate: And though errors in some cases may annul the deeds, as *debiti soluti*, and error calculate, yet such errors may be in substantials, and manifest. The Commissioners found the defence relevant, and instructed by the contract produced; and therefore, notwithstanding all their replies, assolizied the defender.

Balfour, Clerk.

Eodem die.

MELDRUM *contra* STEWART.

MR Robert Meldrum Advocate, having supplicated, that he was incarcerated summarily in the tolbooth of Edinburgh, at the command of the Bailies, for refusing to deliver a writ, which Robert Stewart alledged he had taken from him. The Commissioners did, by a messenger, send for the Bailies, and for Mr Robert out of prison, who *alledged*, That, as advocate, and a member of the College of Justice, he was not liable to the town's jurisdiction. The Bailies *answered*, That the complaints made to them was in relation to a writ concerning Robert Stewart's wife, which he had lent him to see, which Mr Robert had confessed before the Bailies to have torn. Mr Robert denied that he confessed the same, but that he said only it was his own writ, and, if he had torn it, what was it to them; but it was not alledged that he had violently pulled the paper from Robert Stewart, but acknowledged by Robert that he had lent him the paper to see. The Commissioners set Mr Robert at liberty, and desired the Bailies to forbear to trouble the members of the court, and found no riot, but a civil defence; and declared, they were not to discourage the Bailies in suppressing any riot or breach of peace, and withal that they would give summary process to Robert Stewart upon a bill only; who having given in his bill, shewing, that he had only lent the writ to see, being a disposition granted by Robert's wife of her liferent-lands to a — person before the marriage, and that he had kept it up, and would not redeliver the same. The Commissioners without giving the bill to see, ordained him presently to answer; and, having heard him, ordained him to redeliver the disposition in the clerk's hands, and found the bill relevant to be proven *prout de jure*.

June 24. 1658.

BROWN *contra* MURRAY.

MR Richard Brown, having obtained decret for L. 100 against Elisabeth Murray, as vitious intromitter with the goods of her husband, before the commissaries of Edinburgh, she suspends upon these reasons, *1mo*, The decret is null, as being in vacant time. *2do*, It is null, as without probation, in so far as, she is only proven intromissatrix generally; and so particulars of her intromission not instructed, that she might only be liable to the double avail, conform to the commissaries act. The charger *answered*, That he offered him to prove the Commissaries had a licence. The suspender *answered*, *Non relevat*, unless the decret had mentioned the licence; seeing it is the warrant on which the commissaries sat. The Commissioners found the reasons relevant, and instructed; and therefore turned the decret into a libel, That the particular intromission might be proven; and resolved, for the future, to sustain no decreets pronounced in the vacancy, without having, and expressing of a licence.

A a a

June

June 26. 1648.

CARMICHAEL contra THENNISTON.

ELISABETH CARMICHAEL having obtained decret against David Thenniston of Carden, as lucrative successor to his father; he suspends and raises reduction, on this reason, That the sheriffs did him wrong to decern him lucrative successor, only upon production of a seisin following upon a disposition, granted by his father, after contracting of the debt; which being the assertion of a notary, without a disposition or a charter, could not instruct: And being ordained to produce the disposition, he produced the same, and *alleged*, That he could not thereby be lucrative successor; because it contained in itself onerous causes, both generally and particularly. It is *answered* for the charger, That he is yet lucrative successor, because, *first*, though all the sums expressed in the disposition had been all true debts, truly undertaken, and paid: yet the lands are much more worth; for the sum is only L. 1000 of debt, and 1000 merks of bairns portions: And it is offered to be proven, that the lands are worth four or five thousand merks of rent; so that the disposition is lucrative, at least in part. *2do*, The bairns portion cannot be an onerous cause, in prejudice of lawful creditors. *3tio*, The relation in the disposition being of causes onerous, or of debts, cannot prove against a creditor, being between a father and his eldest son, unless the debts be otherways instructed. It was *answered* for the suspender, to the first, That the disposition is not only for the sums mentioned, but bears expressly for the liferents, whereof there is one yet remaining. Albeit the whole cause were not equivalent to the worth of the lands, yet it is enough to purge that odious title passive, of lucrative successor, making the defender liable for his father's whole debts, though never so far exceeding his profits; and therefore she must either reduce, or at least the superplus of the land must be declared liable to her, she paying the debts and portions paid by the suspender; as was formerly done by the Lords in the case of John Weymes, son to the parson of Dunse, who having got dispositions in his contract of marriage of his father's whole estate for a tocher, he was not thereby found lucrative successor *in solidum*, but the lands were declared redeemable from him, upon payment of the tocher: And the most that in the greatest rigour can be demanded here, were, that if the suspender were found liable personally, it should be but for the superplus of the price. As to the second, the suspender, before any diligence done by the charger, had satisfied, or at least secured the bairns portions. As to the third, The pursuers offer to instruct the debt expressed in the disposition. The Commissioners found the alledgeance relevant to infer the suspender lucrative successor *in solidum*, that the disposition was not fully onerous for a cause equivalent to the worth of the lands; and therefore assigned the charger a time to prove the worth of the lands, and the suspender the same time to instruct the onerous cause; but found the bairns portions no onerous cause; seeing he alleged not he had paid them before diligence: For they thought, that the former cause of John Weymes was so decided, in respect of the favour of the contract of marriage, and that the wife's friends, who were strangers, were contracters; but this is a mere voluntary disposition of a father to his eldest son.

Eodem die.

Eodem die.

C O C H R A N *contra* B U R N E T.

WALTER COCHRAN, donator to the escheat of Simon Frazer of Pumercholly, having obtained decret of general declarator, pursues Alexander Burnet, in a special declarator, to make payment to him of certain sums and chalders of victual, that the defender was due to the rebel. It was *alleged* for the defender, No process, because the gift was only granted in satisfaction of the sum of 580 merks; and it bears expressly, it being satisfied, it shall be null: And it is offered to be proven, that the debt is already satisfied, at best the summons can only be sustained for the price of so much of this victual as will satisfy. It was *answered* for the pursuer, To the first, that it was *jus tertii* to the defender, and he was comptable to the fisk for the superplus. The Commissioners repelled the defence; for they thought the defender might secure himself by a double poinding. It was farther alleged for the defender, *Absolvitor*, upon compensation, because he offered him to prove, that the rebel was debtor to him, by bond, in the sum of 2000 merks. It was *answered* for the pursuer, *Non relevat*, unless it were alleged, that the said sum was contracted before the rebellion; for donators are only holden to deduce the rebel's debts that he was owing before rebellion, and these who contract with him thereafter, do it upon their own peril, and follow his trust; and so cannot prejudice the fisk, otherways rebels would make their escheats worth nothing. It was *answered* for the defender, That his defence was relevant, his debt being contracted at any time before he was put in *mala fide*, by any diligence; seeing there is no mean to know a person's rebellion; but *ex abundanti*, this debt was contracted before either gift or general declarator. It was *answered* for the pursuer, That the defender's *bona fides* could not be relevant in these cases, where he follows the faith and trust of the party, as an assignee taking assignation to a debt discharged, or a debt of a rebel, though he do it *bona fide*, yet it avails not. The Commissioners found the defence not relevant, unless the debt had been due before the rebellion; but the defender thereafter alleged, that his bond was given particularly for the price of this victual, and that both were before the rebellion, the Commissioners sustained the defence.

Eodem die.

W H E N L Y *contra* J O H N S T O N.

NICOL WHENLY having charged John Johnston of the Hill, he suspends on this reason, because Alexander Caddel, as assignee by Colonel James to a ticket of 500 merks, granted by the charger's wife to the Colonel, and whereupon there was arrestment used in the suspender's hands, had obtained decret against both the suspender and charger for making forthcoming L. 12 and a merk Sterling, and had poinded the suspender therefor, as he had instructed by the executions of poinding. It was *answered* for the charger, The reason is not relevant, because the suspender colluded, and omitted necessary defences, *1mo*, The decret is given in vacant time, and so null. *2do*, The ticket, whereupon it proceeded, wants the writer's name, and so is null; which, if they had been proponed, would have saved both parties; or, if the suspender had suspended upon double-poinding, as he ought to have done. It was *answered* for the suspender, That he was not obliged

obliged to depone upon the validity of the debt, who was the charger, but who was also called; and if he appeared not *sibi imputet*, and the real pointing took away all appearance of collusion; neither was the suspender obliged to suspend on double pointing, though he might have so done: But however, seeing, by the pointing, the charger *intus habet*, so much of his sum, whereby his debt is satisfied. Unless he will say it was for a true debt, he has no interest, and it were against reason to make the suspender pay twice. The Commissioners sustained the reason, notwithstanding of the answer, the suspender condescending upon the writer of the ticket's name.

Eodem die.

WAMPHREY contra the Earl of ANNANDALE.

THE Laird of Wamphrey, being served and retoured heir to his father, in some lands holden in ward of my Lord Annandale, charges the superior to enter him, who suspends, *imo*, That he, being superior in these ward-lands, could not enter him, because he was not of lawful age. *Answered*, The inquest, by the verdict and retour, had found him of lawful age. *Replied*, Whatever was the sentence of the inquest, that could not prejudice him who was superior, who was not called thereto, that point of the brieve *legitime etatis* not relating to his *servitium militare*, which, by his infestment, he was obliged to. *Alledged*, he had gotten a dispensation anent his age from the Exchequer, and the retour was, he is *legitime etatis ratione dispensationis*. *Alledged*, The Exchequer could not dispense with the age of a vassal of lands not holden of themselves, and that none could dispense with his age but his own superior. *Answered*, The inquest could not without prejudice say he was *legitime etatis*, without this dispensation from the Exchequer, which my Lord Annandale could not dispense with, nor yet my Lord Protector. *2do*, *Alledged*, The superior cannot enter him till first he had gotten the mails, &c. of the land, *durante wardæ*, the relief and the marriage, conform to his infestment. *Answered*, That, by the act of grace and union, all wards were funditus discharged, which was controverted and to be heard *in presentia*.

Ag. Nisbet.

Alt. Gilmor.

Eodem die.

STIRLING contra KILSYTH.

MR James Stirling charging Kilsyth to enter him to lands comprised from his vassal, by three several persons, and now all accumulate in his person, who suspends; because he behoved to have three entries, which the Judges repelled, and found that he should pay but one year's entry for the three. Then *alledged*, that, in they ear's rent payable to the superior, the teind must be deduced, *viz.* The fifth part, which was granted the pursuer, proving the rent of the lands. *2do*, Contended, The real rights and wadssets prior to the comprisings behoved to be deduced, and that he could pay no more than what freely he could have of the land. *Answered*, *Non relevat*, unless he say, that he as superior had confirmed those rights. *Replied*, *Non refert*, confirmed or no; they were good valid rights, which the superior could not challenge, he being but a blanch superior; for the case was put, as if a vassal holding feu or blanch, had sued out his hail lands without his superior's consent, as he may, and that the vassal's property was thereafter comprized;

comprized ; and the superior of the lands feued by the vassal, craves a year's duty without deduction of the feus. This was disputed, but not decided; therefore found the superior should have a year's duty, without deducting the rights anterior to the compriser, not confirmed.

Eodem d'e.

S W I N T O N *contra* W E D D E R B U R N.

IN the foresaid declarator of property, Swinton *contra* Wedderburn. *Al-*
ledged, That Wedderburn was minor, *et quod non tenebatur placitare.*

Eodem die.

B A N N E R M A N *contra* the Countess of M U R R A Y.

BANNERMAN pursuing the Countess of Murray for seven year's fee, on a promise made by her *stante matrimonio* to pay her : This they found not relevant, because a woman, though *mater familias*, and though for servant's fees, could not be conveyed on a promise made in her husband's time.

Eodem die.

ONE comprising lands, where out of he had an annualrent due, redeemable by payment of the principal sum, for his principal may return to his infestment of annualrent ; for it was found, the infestment of annualrent was not extinguished, by comprising the property for the principal sum, and that the creditor, notwithstanding thereof, may return to his infestment of annualrent, but not bruik both *simul et semel*, though he may use any of them he pleases.

Act. Hodge *Alt. Syme.*

This decision holds not now, since his Majesty's restitution, but the old has place.

June 29. 1658.

N A E S M I T H *contra* J E F F E R I E S.

BARBARA NAESMITH pursues Thomas Jeffery her son, and John Jeffery his tutor, for making payment to her of the whole moveable sums and goods, belonging to umquhile Thomas Jeffery, her husband, by virtue of a missive-letter, containing a testament or codicil ; whereby he wrote to the pursuer, that, in case he died, she should do what she pleased with any thing belonging to him, whereby she claims right to his whole moveables. It was *answered* for the defender, *Abfolvitor*, because the missive-letter, will not import an universal legacy or donation of all his means, but only a power to order and manage the same. *zdo*, Though it could, yet being but a legacy, it can extend no further than to the dead's part, which was half of the moveables, in respect that this pursuer, by her contract of marriage, had renounced her third ; and so the goods behoved to divide in two parts, between the defunct and the bairns, as if there had not been a wife. It was *answered* for the pursuer, to the *first*, That she opposed the missive, bearing expressly, in the end thereof, that that was his testament ; and as for the

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meaning

meaning of the clause, the letter bears, that the pursuer was worthy of it all, if it were ten times more, but desires her to quit a part of it to certain persons named in the letter; which clearly sheweth, that the meaning was, that the goods should be her own: As to the general, the said universal legacy must extend to two thirds of the moveables; because her acceptance of her provision, and satisfaction of her third, must be interpreted in favours of her husband, with whom she contracted, and to accresce not to the bairns but to himself; and so the dead's part was both his own, and the wife's whole third. It was *answered* for the defender, That all these renunciations of portions, renounced by children, when they are forisfamiliated and provided, do still accresce not only to the father, but to the wife, and remanent children unprovided: The pursuer can never now crave, by his letter, a power to dispose of the goods as her own; because, in a decret at her own instance, it is declared, that she would make use of that power, if her son live to twenty-one, which she has homologate by extracting the decret, and granting discharge conform thereto. It was *answered* for the pursuer, That that declaration was only done by her factor without warrant; and so, being extraneous to the decret, she might make use of the decret, whereof that was no part, but only a voluntary extrinsical declaration of a factor: So that the using of the decret, homologate not that which is merely extrinsick. The Commissioners found the letters to be an universal legacy, and found the renunciation to accresce to the whole family; and therefore the goods divided in two; and that the said universal legacy extended to the half, as the defunct's part; and that the said declaration of the factor, and alledged homologation, bound not the pursuer thereto.

Downie, Clerk.

Eodem die.

WALLACE contra Lord MONTGOMERY.

KATHARINE WALLACE having charged the Lord Montgomery for many years bygone, for a pension of 500 merks provided by my Lord Montgomery to her umquhile husband, and the longest liver of them two, for her husband's many services to my Lord and travelling abroad with him; my Lord suspends, on this reason, That he is a forfeit person, and that, by the act of restitution, creditors are appointed to take lands for money, after two years time, which is not yet come; so the letters must be suspended to the time. It was *answered* for the charger, That this, being a pension for service, is both alimentary, and in effect a servant's fee. The suspender *answered*, That there is no exception in the act; and that the sum is now become very considerable. The Commissioners found the letters orderly proceeded for the pension preceeding the act of restitution, with the provisions contained in that act; and found the letters orderly proceeded *simpliter* for the years since the act, and in time coming.

Ba'four, Clerk.

Eodem die.

— contra —

— pursuing — as lawfully charged to enter heir to his father, the defender offers to renounce. The pursuer *alleges* he cannot, because he hath behaved himself as heir, in so far as, in another process, wherein he was pursued

pursued as representing his father, he compeared, and proponed an exception of payment; after which he could alledge nothing anent the passive titles, which can only be on this ground, because that peremptor was a behaviour as heir. The Commissioners found the alledgeance not relevant to infer behaviour as heir; for they thought the proponing of the peremptor did free the defender from proving the passive titles, not as behaving as heir, but by the ordinary form of process, not allowing two litiscontestations in one cause.

Eodem die.

S C O T T *contra* C O C K B U R N.

JOHN SCOTT pursues Richard Cockburn of Clerkington, as lucrative successor to his father, of his father's whole estate. It was *answered* for the defender, That he, being an infant, could not be esteemed to accept of such a disposition; and therefore cannot be liable thereby. It is *answered* for the pursuer, That, though a pupil, yet the defender hath accepted, in so far as he, or others in his name, doth bruik the lands thereby; and therefore, he must either accept, or otherwise renounce the same, and to be heir; or then he may both bruik the estate, and not to be liable to the debts. The Commissioners repelled the defence, unless the defender would renounce the disposition, and to be heir.

Eodem die.

The Laird of SWINTON *contra* RUTHERFOORD, and the Laird of WEDDERBURN.

THE Laird of Swinton pursues a decret on a declarator of property of the lands of Threeplands, as being part and pertinent of his barony of Swinton, against Patrick Rutherfoord, who had a proper wadset of the lands of Ramfrig, and thereby claimed commonty in the lands of Threeplands, and against the Laird of Wedderburn, as having the right of reversion and superiority. It was *alleged* for Wedderburn, No process, because he is minor, *et minor non tenetur placitare super hereditate paterna*; but the lands of Ramfrig were his father's and predecessors heritage, wherein they were infest with common pasturage, at the least with part and pertinent, and, by virtue thereof, in immemorial possession of common pasturage in the Threeplands, either as common pasturage of Ramfrig, or at least as pertinent thereof. The pursuer *answered*, that the said action is a proper municipal custom of this nation; and so not to be extended any farther, than by law or custom it hath been formerly extended, which was only in the case of reduction, and where the minor could not alledge that it was his father's or predecessors property; but here, the pursuer is insisting in a declarator of property for declaring his own right, and not for taking away the minor's right, which he neither acknowledgeth nor calls for. *2do*, All the minor's interest is only, that he bruiks this as a common pasturage, or as a part of his lands of Ramfrig; which, being servitude only, falls not within the action. *3tio*, Although the minor is here called for his interest, he cannot sist the process, seeing Ruthhead is major, who is principally concerned. It is *answered* for the defender, That his defence stands most relevant, and is a very noble law of the nation in favour of minors, that they be not compelled to dispute their heritage before they come to their perfect age, and may know their

their own right. And as to the replies for extending thereof, the clear words and sense, and also the reason of it, will give its genuine extension, so that it cannot be restricted, but that where law or practice have restricted; and therefore though it occurs most ordinarily in reductions, because they are the petitory judgments, whereby right is commonly decided; yet it must be also competent in a declarator; because the reason is alike in both, and, because otherwise the law should be elusory, seeing there is nothing that can be pursued by reduction, but it may be turned over in a declarator: And though here the pursuer only craves his right of property to be declared, yet that will for ever exclude all who are called for any right of property, or commonty. *2do*, As to the second reply, where the law excepts not, and the reason is the same, there we ought not to except; and therefore, seeing the commonty is heritage as well as property, and is oftentimes, and in this very case, very considerable, the reason is alike, and the law alike for both, and it hath been so decided before, as in relation to commonty. As to the *third*, Though Ruthhead hath a proper wadset, yet the minor hath the principal interest, as having the right of the reversion and the right of superiority, whereby he is not denuded; but the wadsetter, by a meer discharge of the sum, and resignation *ad remanentiam*, may be denuded in the minor's favours, without any new infeftment; and the minor is liable in absolute warrandice, not only personal, but real by infeftment out of other lands, and particularly by this commonty controverted. It is *answered* for the pursuer, That this action hath many exceptions, as takes not place in improbations, in cognitions of marches, molestations, &c. and there is not one practice for it, where-ever it was sustained in a declarator. And as to the privilege of minority, the pursuer hath a special gift of my Lord Protector, whose advocate concurs for his interest; and who has also privilege as any minor, *et privilegatus* where *privilegatum non utitur privilegio*: And as to the minor's interest, though it were greater than the wadsetter's, yet it is personal interest, and such as the pursuer needs not know, as the right of reversion is a personal obligation, *factum de retrovendendo*, so is the clause of warrandice: And as for the superiority, it is not necessary to be considered in such a process, and cannot sist; for therein, or in molestations, or cognitions of marches, superiors were never called: And if their minority could bar processes, then the same would be competent to the superior's superior; so that, as it is ordinary to have subaltern rights, the property could never be discussed so long as any one of them were minor; but the superior loses nothing, because this right is adjected to him by possession, and not by his own right; and though it were taken away, his feu-duty will be the same. The defender *answered*, That none of the exceptions from the law meets the cause, where heritage is in question; for improbations are excepted *in odium falsi*: And least the witnesses insert in writs die, and so the probation perisheth, the others are only possessory judgments, where the heritable right is not questioned: And as to the Protector's interest, he will neither win nor tyne by the cause, seeing he hath gifted it to the pursuer, and retains only the right of superiority, which is common to both parties, being superior to both; and so his advocate cannot own the one, and disown the other; and as to the interest, whether they be personal, or real, the minor hath still the greatest interest.

June 30. 1658.

Mr JOHN HAY contra HAY.

MR JOHN HAY advocate, pursues Gilbert Hay, as behaving himself as heir to his father, for payment of a bond of 200 merks due by his father, and condescends on the behaving, *first*, in so far as he wore his father's best cloak. *2do*, Severally, in so far as he made use of his father's best board, bed, cloaths, fire, vessels, &c. It was *answered* for the defender, To the *first*, The cloak is *res modica, et de minimis non curat lex*, and cannot infer that odious passive title to make the defender liable to all his father's debts. As to other particulars, *1mo*, *Non relevat*, Unless that the defender had sold and disposed the said goods, but not by simple using thereof, which is only to be repaired and made up. *2do*, The pursuer must condescend *quando*; for, if he say in pupillarity, or done by tutors or curators, it cannot bind the defender, or done by the defender himself in his minority; then denying the quantities, the alledgeance ought to be repelled, because he offered to prove, that he was minor, and did revoke *annos utiles*. It was *answered* for the pursuer, That his condescendence was most relevant, and that the court ought not, upon pretence of *res modica*, to make that passive title uncertain; and that it hath been oft sustained upon very small particulars. To the *second*, The pursuer insists not for the intromission in pupillarity against tutors and curators, but against minors in their minority, either when major or minor, against which the revocation cannot be relevant, unless it were revocable. *Alledged*, That he revoked and raised reduction before his age of 25. The pursuer *answered*, That in this case the defender needed not to raise reduction, because there was no decret to reduce. The defender *answered*, That he might have reduced, or declared in his revocation, that his deeds of intromission were within his minority, and that they ought not to infer *gestionum*; for his revocation is a private debt, and cannot make an interruption without a summons. The Commissioners found the first condescendence of the cloak only relevant; found the second, by using the bed and bed-cloaths, &c. by lying therein, &c. relevant, without necessity to alledge disposed thereon; and repelled the defence of minority and revocation, without intending reduction *intra annos utiles*.

Dounie, Clerk.

Eodem iz.

M'GILL contra KIRKLAW.

ALEXANDER M'GILL pursues David Kirklaw, Bailie of Cowpar, for the sum of 200 merks, due by Gilbert Paterfon, who being taken with caption, and put in the Bailie's hands, he suffered him to escape. The defender *alledged*, *Absolvitor*, Because he offered him to prove, by the colleague messenger, and the witnesses there present, that the messenger who incarcerated Paterfon, did expressly deliver him to the Bailie upon these terms, That he should keep him at his own house, and to make him forthcoming, whensoever he required, which he offered there to do *cum omni causa*; and whereas the instrument of incarceration upon the caption bears otherwise, he offered to prove that part false, *et non ut actum erat*. The pursuer *answered*, That he opposed his instrument upon the caption, bearing the prisoner delivered, to have been incarcerated in the tolbooth; and the alledgeance is not relevant, though the instrument had borne as the defender al-

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ledgeth, unless he *alleged*, that he kept him prisoner in his house ; which he did not. The Commissioners found the defence not relevant, and discerned.

Eodem die.

The Laird of DUNDAS and Sir JOHN DOUGLAS *contra* STEWART and MELDRUM.

THE Laird of Dundas and Sir John Douglas, compearing, in their interest, in the complaint made by Robert Stewart against Mr Robert Meldrum, for keeping up a disposition, granted by Mr Robert's wife, to a — person of her liferent, which he gave only to fee ; whereupon they *alleged*, That seeing the writ was now produced, and that it was acknowledged by both Robert Stewart and Mr Robert Meldrum, that it was in Robert Stewart's hands ; therefore they ought to have it up, because they offered them to prove by Robert Stewart's oath, that the writ was depositate in his hands, to be filled up with a person to their behoof, to be made use of, ay and while they be relieved of certain debts due to them, and which they were engaged for by Mr Robert's wife's first husband. Mr Robert Meldrum *answered*, That seeing he had in his hands delivered to him and his wife the said disposition, that was only probable by his oath or witnesses, whether it was given to him only to fee, or if it was a writ retired ; whereupon litiscontestation was presently made upon Robert Stewart's bill, finding it so probable. It was *answered* for Dundas, That though it could only be so probable upon Robert Stewart's complaint ; yet they compearing, and the writ being produced, and the disposition acknowledged, it was never questioned, but the depositor's oath was relevant to prove the times and the dispositions ; and though Robert Stewart should collude, and warrantably give up the evident. The Commissioners found this alledgeance relevant, and ordained Robert Stewart to depone thereon.

July 1. 1658.

DALRYMPLE and LINDSAY *contra* FLEEMING.

CHARLES DALRYMPLE and Lindsay, executors-creditors confirmed to umquhile Adam Masson factor, pursues Thomas Fleeming merchant, for payment of two bonds due by him to the defunct ; the true cause of granting the bonds, was a fitted accompt betwixt the defender and umquhile Masson, who was his factor ; which accompt is produced, and which, with the bond, sufficiently instructs the bond to be for the same cause, in so far as the accompt is dated the 24th April, and bears, that there was a bond granted for the balance thereof, and, adjoined to Masson's subscription with his own hand, bears *errors excepted*, and the one bond is of the same date, and the other by mistake on the 25th, and so must be for the same sum, unless the pursuers would condescend upon any other bonds, especially seeing the bonds bear not borrowed money, but only debt owing, and by that clause, *excepting error*, all competent reduction is reserved ; and the defender condescends upon these two errors, *first*, That in the accompt is mentioned a cargo, and which he offers to prove, there was a bargain of wines, which Masson bought for the defender from Ducornet, and which wines were, at the time of delivery, sophisticated and spoilt ; and likewise another parcel of herrings of the said accompt, which was spoilt, which the defender offers to prove by witnesses ; and therefore, the factor being liable for his office and trust

trust for diligence, the insufficiency of the wine that he received, it must be upon his own hazard. It was *answered* for the pursuers, That they oppone the bonds, being clear and liquid, and cannot be proven to be on the accompt, for the reasons adduced, because one of them is of another date, and doth not agree with the balance, but are L. 600 greater. *2do*, Though it could be so instructed, yet the reservation of error or exception can import no more than errors in calculation, otherways the accompt should signify nothing. To the *third*, The sophistication can never lie upon the factor, seeing the defender acknowledgeth, that he was present in France at the entry of the wines, and came home in the ship with them; and, unless the factor had been *in dolo* or *lata culpa*, he cannot be made liable for the insufficiency of the wine, as the merchant who sold it might; because, though he knew nothing of it, yet, not giving ware sufficient, he must make up the detriment, and has no damage, but only *lucrum cessans*. The Commissioners found the alledgeance sufficient to instruct the bond was for the accompt, unless the pursuers condescend upon other bonds, and found errors excepted only to make errors *calculi*; but, because any exception competent against the defunct for sufficiency of ware was competent to his executor, before answer to that part, remitted to merchants to settle the parties, or otherways report, if, after such a fitted accompt as this between merchants and factors, the merchant may alledge the ware was insufficient, and how far the factor will thereby be liable.

Balfour, Clerk.

Eodem die.

M A X W E L L *contra* I R V I N G.

MR William Maxwell pursues John Irving in Sarksheills for mails and duties, and for removing. The defender *alleged*, *Abolutor*, because he hath tolerance from Irvine of Bonshaw, which Irvine of Bonshaw stands publickly infest in the lands of Sarksheills, and was, by virtue of his infestment, in possession seven years before the intending of the cause, *viz.* from 1640 to 1649. The pursuer *answered*, The defence ought to be repelled, because the said possession was vitious and clandestine, in so far as the pursuer's author obtained decreet *in anno* 1642, against John Armstrong, who was former possessor, and who clad himself formerly with Irvine of Bonshaw's right, as now the defender does, who has married his wife, and continued in his vitious possession. *2do*, Any possession that Irvine of Bonshaw had, either by Armstrong or this defender, was clandestine, at the time when the Master of Maxwell, the pursuer's author, being in opposition to the country: And, by act of parliament, the Earl of Nithsdale and his friends were restored to all their possessions. *3tio*, The Countess of Buccleugh having pursued Irvine of Bonshaw, he defended himself with the Master of Maxwell's right, as appears by a decreet produced. *4to*, The Master of Maxwell intended a process, and a wakening thereupon, within these seven years, which is produced. The defender *answered*, To the *first*, That any decreet against Armstrong, cannot prejudge Irvine of Bonshaw, which was publickly infest, and not yet called. To the *second*, The Master of Maxwell his being sequestrate or restored, cannot take from the defender the benefit of his possessory judgment; seeing he might have informed the State within these seven years, and intended action: And as for the wakening which is alledged upon, *nihil est*, unless the principal summons had been produced, and

and had been against this defender, or Armstrong the former possessor, Irvine of Bonshaw being called: And as to the Earl of Buccleugh's decret, he had never any right to the lands of Kirkonell or Sarksheills, nor is there any mention of the lands therein. The Commissioners found the defence relevant, notwithstanding of the replies, and found the tolerance only probable *scripto*.

Balfour, Clerk.

Eodem die.

STIRLING *contra* the Lord KILSYTH.

MR John Stirling having charged the Lord Kilsyth to enter him upon several apprisings, Kilsyth suspends on this reason, That he can receive him only upon apprisings, upon payment of a year's rent for every apprising. *Answered* for the charger, The reason is most irrelevant; for the act of parliament ordained only a year's duty to be paid to the superiors for entering the apprisers; and if this were sustained, when there is so many apprisings, the superiors may get more for entering the apprisers than the worth of the lands; and therefore the charger having right to three apprisings, offers a year's duty for all. The Commissioners repelled the reason, in respect of the answer, and found the letters orderly proceeded, the charger paying, or consigning one year's rent before extract.

Dounie, Clerk.

July 2. 1758.

RAMSAY *contra* M'KELL.

UPON the supplication, at the instance of David Ramsay of Turbane, shewing that he was discerned as heir to his father for payment of a bond granted after he was interdicted, whereunto Thomas M'Kell hath right: In which decret the interdiction is found only to extend to the lands and real rights that the persons interdicted had within the shire where the interdiction was published; but that the bond granted thereafter might affect any other lands, and might be effectual against moveables, and for personal execution against the granter himself, ay and while he should make payment out of his moveables, which interdictions reach not; yet his heir can be liable to no execution personal, as heir to him in his real estate, unless he had been executor or intromitter with his moveables, and represented him in his moveables, or had succeeded to him in lands in other shires than where the interdiction was published, otherways the intent of the interdiction, in preserving the interdicted person's whole estate to his heirs, should be void and elusory; seeing by the personal execution he would be forced to lie in prison, or else to sell any estate he had. The Commissioners found that the defender should not be liable for personal execution, unless executor or intromitter, or had lands out of the said shire.

Eodem die.

MUIR *contra* LINDSAY.

ONE of thir parties, being lawfully charged to enter heir to his grandfather, to whom he was apparent heir, was conveyed to pay the debt, and offering to renounce: It was *replied*, He could not renounce, because he had given

given bond to one Jamison, and being conveyen on that bond, as lawfully charged to enter heir to his grandfather, a decret is given against him, whereon his hail grandfather's estate is comprised from him as lawfully charged, &c. and so he could not now renounce to be heir, seeing by a deed of his the estate was comprised; and so *res* was not *integra*, unless he purchase a renunciation of that comprising, flowing on a deed done by himself. *Answered*, The granting of that bond was not such a deed as could hinder him to renounce to be heir in this process; for nothing can hinder a renouncing, but *gestio pro herede*, or that he meddled, which the granting of the bond, whereon comprising followed *per rerum natura*, can never import; and that it was not in his power to make the compriser renounce *in hoc judicio*, but a reduction must be raised and the compriser called. On the the other hand contended, the granting of the bond was alike, as if he had disposed his grandfather's estate to the compriser, in which case he could never renounce, no more can he do here.

Act. Gilmer.

Alt. Gilmer.

The act of parliament 1661, does clearly determine this point.

July 5. 1658.

M O R E *contra* L I N D S A Y.

JOHN MORE pursues Bernard Lindsay, as oye, and lawfully charged to enter heir to his goodsire, for payment of a debt of his goodsire; he offers to renounce. The pursuer *answered*, He cannot renounce, because *non res integra*, in so far as he has granted a simulate bond, to the effect, that his father's estate may be apprised from him, and now bruiks by virtue of that right. The Commissioners repelled the defence, in respect of the reply, unless the defender would renounce likewise the aforesaid apprising and adjudication.

Eodem die.

B R U C E *contra* S C O T T.

MR JOHN BRUCE pursues William Scott of Hartwoodmyres, for reduction of a bond, granted by the pursuer to him, upon error and circumvention; because the said bond was granted for satisfaction of a debt due by his father-in-law, to whom he succeeded, to Hugh Scott of Deuchar, in which bond the said William Scott was cautioner; and which bond was satisfied by the pursuer's good-father, or his relict and executrix, to Deuchar himself: And yet this William Scott, one of the cautioners, took assignation from Deuchar himself, and thereupon obtained this new bond: Which reason being formerly found relevant, it was now farther *alleged* for the defender, That the said bond could not be reduced and reponed, unless the defender also were reponed, and put in his own place; because, when he granted this bond, he delivered to this pursuer an assignation, granted by Deuchar to him, concerning warrandice, and is content the said new bond be reduced, providing he back his assignation to distress Deuchar upon the warrandice. It was *answered* by the pursuer, That the assignation was given him to be used as his own writ, and was presently destroyed at the receipt thereof, in prejudice of the defender. The Commissioners thought the answer to the reason relevant; but being informed, that there was nothing paid by the defender for the said assignation, did, before answer, ordain

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the pursuer to insist against Deuchar upon double distress, both upon the first discharge granted by Deuchar himself, and the other discharge granted by the cautioner as assignee.

Eodem die.

The Minister of *AITON* contra the Minister of *MORDINGTON*.

THERE being a double poinding raised at the instance of the Laird of Lamerton against the minister of Aiton on the one part, and the minister of Mordington on the other part; that they might discuss their right to that part of the stipend paid out of his land, which was formerly as a part of the locality of Aiton, and is now claimed by the minister of Mordington, who *alleged*, That, by a decret of the commission for plantations, in *anno* 1649, the kirk of Mordington was erected, and the lands of Lamerton, and other lands in question, were dismembred from Aiton, and annexed to Mordington, and a stipend decerned to be paid, both out of the old parish of Mordington, and the new annexed lands: And after he obtained a decret, in *anno* 1652, before the Judges, against Lamerton, allocating the stipend paid by Lamerton, and decerning him to pay the same to him; and that he had been in possession conform thereto: And if it should be recalled, there was nothing within his own parish to make it out; whereas, there was abundance of teinds in the parish of Aiton to make his out. The minister of Aiton *answered*, That as to the first decret of dismembration, there was no decret of locality therein, taking away the locality of Aiton, and applying to Mordington; but only a general clause, that was in the common style, that the stipend should be paid out of the parish, now old, which can only be meant if there were more teinds in the lands annexed than there was in the minister of Aiton's locality, but can never take away or remove his locality, unless it had been so expressly decerned: And as to the second decret, it could work nothing against the kirk of Aiton, because neither the minister nor presbytery of Aiton, in the vacance, were called thereto. The Commissioners throw the reason of preference for the minister of Aiton, to prefer him to the minister of Mordington; but because of the great inconvenience of the kirk of Mordington, they, before answer to the dispute, ordained the minister, to do diligence for a locality out of his parish; and, if he were not satisfied, they would decide as aforesaid.

Eodem die.

BARBER contra Sir *JOSEPH DOUGLAS*.

ELISABETH BARBER having charged Sir Joseph Douglas, upon a bond of borrowed money granted by him to her, he suspended, and raised reduction, on this reason, That, by the charger's discharge produced, of that same date with the bond, instructed, that the cause of the bond was for satisfaction of a decret, obtained at the charger's instance against him absent, for the like sum, as part of her husband's stipend of the kirk of Caldercleir, due in *anno* 1641; and therefore, in the warrantice of her discharge, she is obliged to warrant, that decret was upon a once debt really due to her husband in *anno* 1641; because, by the decret of erection of the kirk of Caldercleir, it is evident, that it was erected only in 1642, and no mention of any rights to bargains. The charger *answered*, That her husband

husband had presentation and collation for the year 1641, and obtained decret against the same suspender for the year 1641. The defender *answered*, That presentations and collations were only *periculo petentis*, and could not give a right to a stipend, where there was no kirk; and as to the decret conform, the defender replies that same reason against it. The Commissioners found the reason of reduction relevant, and proven; and therefore suspended, and reduced.

July 6. 1658.

POLMAIS *contra* BARNSCHOU GAL and Mr CHARLES
S M I T H.

THE Laird of Polmais, having arrested some sums due to Sir Mungo Murray, in the hands of Barnschougal and Mr Charles Smith, obtained decret, for making the sums forthcoming, before the sheriffs of Stirling, upon production of Barnschougal's bond to Charles Smith and his declaration, that his name is used to the behoof of Sir Mungo Murray. Barnschougal suspends, and raiseth reduction upon these reasons, That the decret is null, because it proceeded not upon two citations, one of fifteen, and one of six days, as is instructed by the decret. *2do*, It was *a non sua judice*, Barnschougal not dwelling within the shire of Dumbarton. *3tio*, It is unjust, because it proceeded upon Mr Charles Smith's declaration, that the money was Sir Mungo Murray's; which declaration contains a quality, that it infer no double distress, because Mr Charles had formerly granted to the said Sir Mungo an assignation — in the assignee's name, that the sheriff decerned *simpliciter* without that quality. The charger *answered*, To the *first*, That nullities upon dilators, for want of competent days, were never sustained, unless there was some material defence in the merits of the cause. To the *second*, Barnschougal is within the barony and regality of Lenox, which is, by annexation, within the shire of Dumbarton, and was both on the community of that shire, and pay cess there, and he has no other land but within that shire. To the *third*, The quality in the declaration was justly rejected, seeing Mr Charles did neither condescend on the date, writer, or witnesses of that — assignation; neither will it infer double warrandice, and yet the charger is content, that of consent, that quality be inserted in the decret, providing Mr Charles condescend upon the date, writer or witnesses, otherways he may make up a new assignation when he pleaseth. The Commissioners repelled the reason of reduction, in respect of the answer, and found the letters orderly proceeded, and ordained Mr Charles to condescend upon the date, writer and witnesses, otherwise the said defender's decret should be given out simply, without adjecting the said quality.

Downie, Clerk.

Eodem die.

STIRLING *contra* the Lord KILSYTH.

MR JAMES STIRLING, having charged the Lord Kilsyth, to receive him upon the apprising, he suspends, and craved a year's rent. The charger craved deduction of wadsets, and liferents. The suspender *answered*, *Non relevat*, unless these wadsets or liferents be confirmed to the superior, or by his consent; for seeing an express act of parliament gives the superior a year's rent, as the land set cannot be taken from a superior by any deed of a vassal

vassal, without his own consent, or the law. The charger *alleged*, That it hath been so found in the case of lands liferented, where the composition hath been delayed till the liferenter's death; and that where the superiority was apprised, the feu-duty was only payable to the superior, the suspender. These instances merit not this case; for the law, without the superior's consent, has only allowed two causes, *viz.* setting of lands in feu, and the tacks; because the act appointing the year's rent, expresseth it as the lands are then set. The Commissioners found deduction not relevant, and that only feus or tacks could deduce from the year's duty, unless they were confirmed or consented to by the superior.

July 7. 1658.

H A Y *contra* H A Y.

MR John Hay, in the pursuit against Gilbert Hay, as behaving himself as heir to his father, by intromission with his father's best cloak, whereof mention is made June 30. It was now farther *alleged* for the defender, That not only this cloak was *res modica et singularis*, but worn by him shortly after his pupillarity, but also he offers to prove, that it was eight years after his death, and that he was then boarded with his mother, and paid her such a sum for meat and cloth, as a part whereof she gave him this cloak, and offered to make faith that he knew not the cloak belonged to his father, and offered to renounce all right and interest he can claim by his father, which was found relevant. But thereafter the pursuer condescended, that he offered him to prove that the defender, or his curators, drew an heirship of the whole moveables from the mother, whereof this was a part, and did deliver the same to the defender to be worn, after his pupillarity; which was found relevant, and the contrary defence found relevant.

Eodem die.

ELISABETH ——— *contra* H O M E.

ELISABETH ——— pursues Robert Home, for payment of a sum contained in a ticket. Home *alleged*, *Absolvitor*, because he offers him to prove by the writer and witnesses of the ticket, that there was two or three persons in such a place called *Robert Home*, the designation being the same, and the ticket subscribed by a notary, that he was not the Robert Home subscriber of the ticket, but another Robert Home. It was *answered* for the pursuer, That his writ could not be taken away by witnesses, and that he behaved to improve it. The defender *answered*, That the ordinary writ proves itself till it be improven, yet where the question is about the parties, by many of the designation, and not about the truth of the writ, in that case, the writ should not prove against one of them, unless the user would by witnesses prove, That the defender was he; but here the defender burdens himself with probation positively that it was another. The Commissioners, in respect of the singularity of the case, and being unwilling to lead a case in the ordinary form to be a preparative, before answer, ordained the writer and witnesses to be examined *ex officio*.

Eodem

Eodem die.

LEITCHFIELD *contra* MOORE.

THOMAS LEITCHFIELD, merchant in Leith, pursues one Moore in Glasgow, as behaving himself as heir to his father, by uplifting of the mails and duties of the lands, wherein his father died infest. It is *answered* for the defender, That the pursuer ought to condescend when, and by whom the intromission was, Whether in his pupillarity by his tutors, or not; for if, in his pupillarity, his tutor's intromission cannot infer *gestionum*, as is now the ordinary practise. It was *answered* for the pursuer, That though the tutor's intromission will not infer *gestionum simpliciter*, yet it will make the tutor liable, in so far as he, or his tutor in his name, intromitted. The defender *answered*, That the pupil can only be liable *in quantum factus est locupletior*; and so not by his tutor's intromission, unless his tutor has compted, and converted to his use; otherways pupils might be destroyed, if their tutors should be vitious intromitters with great sums of money; especially seeing there is no necessity, because the tutor, *proprio nomine*, is liable for his intromission *quantum intus habet*. The pursuer *answered*, That seeing, *de rigore juris*, pupils were liable *in solidum per gestionem*, even by their tutors, it is now favour enough, that they are liable only in so far as their tutors intromitted; who are their legal administrators, and intromitted in their name, in the same case, as if they were their factors, and what they have in their hands as tutors, their pupils have it: And the instance of vitious intromission will not be alike, seeing a tutor, *ex officio*, neither may nor should intromit vitiously with that which is not the pupils; yet they both may and must intromit with the rents of the pupils lands, even though their pupils be not infest. The Commissioners found the condescendence relevant against the pupil, in so far as the tutor intromitted with the rents of the lands.

July 8. 1658.

CANT *contra* CHEISLY.

LEWIS CANT pursues Patrick Cheisly for reduction of two bonds, one of 100 merks for a velvet cassock, payable after the debtor's death, the other for a diamond ring, then also payable: His reasons were, having curators and not consenting, and severally, minority and lesion, not only inequality of the price, but also he offered to prove, that the cassock was presently delivered back to the defender. The defender *answered*, That they alledged lesion, of redelivery of the coat, being to take away his writ, was only probable *scripto vel juramento*. The pursuer *answered*, That he, being minor, ought to be restored to the manner of probation by witnesses. The defender *answered*, That minors are not to be restored against the law, but against their own deed: The Commissioners found the first reason relevant; without alledging of any lesion, unless the defender replied, *in quantum minor est factus locupletior*, in which case they allowed the minor to prove by witness the delivery of the cassock, being then not to take away a writ, but a reply.

E e e

Eodem

Eodem die.

The Earl of G A L L O W A Y *contra* F E R G U S S O N of
K I L K E R R A N.

THE Earl of Galloway having charged Alexander Fergusson of Kilkerran for a sum of money, he suspended upon this reason, That the Earl had poulded certain of his goods, for the said sum, conform to an execution produced; and craved not only the prices of the execution may be allowed, but that he may be heard to prove the just prices; seeing it is evident, by the executions, that the goods were poulded far within the value. The Commissioners had formerly ordained witnesses oaths to be taken *ex officio*, which was now questioned by the charger, alledging, that poulding of moveables being the ultimate execution, and being done according to the law, upon the oaths of four appraisers, as the execution bears, the same cannot be quarrellable upon null appretiation; seeing it was the debtor's fault, to whom they were offered, and did not redeem them; and hereby there should never be a poulding, but this would be an obvious objection, and so make the poulding a new process and probation; but especially it cannot be receivable by way of suspension, for the suspender to quarrel the poulding, that he alledges upon, without which, neither his alledgeance is liquidate, nor instantly verified. It was *answered* for the defender, That the exorbitance of the misappretiation was palpable and evident to the Judges themselves, and therefore they had, *ex nobile officio*, ordained re-examination. The Commissioners rescinded their former interlocutor, and repelled the said reason *hoc loco*.

Eodem die.

C U T H B E R T S O N *contra* W A L L A C E.

ROBERT CUTHBERTSON, having arrested in the hands of Andrew Duff and William Ramsay the sum of L. 3000, as due by them to Jacob Danfer, a Dutchman, to be made forthcoming for a sum due by him to Cuthbertson. Comparance is made for Hanse Wallace, who *alleged* preference, because, before the arrestment, he had obtained an order from Jacob Danfer to the defender to answer the money. The arrester *answered*, *Non relevat*, unless the order was *in rem suam*, whereof, thereby, he was but a factor to Jacob Danfer, he cannot hinder Danfer's debtor; and if it be for his own behoof, then it is *sub alio nomine*, an assignation that is *a proprio in rem suam*: And so not being intimated before the arrestment, cannot exclude him. It was *answered* for Wallace, That he offered him to prove, by the custom of merchants, that such an order as he hath without an intimation, at least upon verbal information, probable by the debtor's oath or his own, will exclude any posterior order or arrestment. The arrester *answered*, That, if both he and Wallace were merchants, and had so acted in this business, that the acts of merchants might rule them; but he not being a merchant, but acting by the common law of the land, and arresting within a day or two after the date of the order, is not obliged to dispute, whether there be such a custom of merchants or not, which is not at all probable, and were very unreasonable. Wallace *answered*, That the law of merchants was a custom justly and necessarily received in all nations, without which there could be no trade; seeing merchants cannot know the laws of every country

country they trade in; and therefore, if by that law the merchant granting the order is fully denuded, and the receiver fully constitute in the right, nothing done thereafter, either by the law of merchants, or by the common law, can take away a right once rightly constituted: And that custom is not unreasonable; for intimations are but positive constituting, without any absolute or moral necessity; and in some cases, as in judicial assignations of heritable sums, are not necessary. The Commissioners ordained, that the Dean of Guild of Edinburgh should give his opinion what was the custom of merchants in this point; who having given in his opinion, that, by the custom of merchants, is required neither acceptance, as a bill of exchange, nor intimation, as an assignation, but gave a full right alone, and excluded all posterior rights: Therefore the Commissioners found the alledgeance upon the said custom relevant, and ordained that to be proven by merchants, as witnesses, upon oath.

July 9. 1658.

C O R B E T *contra* C O R B E T.

HUGH CORBET of Hundgrey, as executor confirmed to his grandmother, having obtained a decret against Walter Corbet of Tonfors, her son, for several rents and sums due by him to his mother; Walter suspends, and raiseth reduction on these reasons, *first*, That it was given upon the report of an auditor, and that he was not heard after the report; which if he had been, he would alledged, as he now *alleges*, That, of the sums decerned, he had paid L. 800 to his executors, or his mother, to the executors knowledge, which the executor acknowledged by his oath; yet the auditor, in respect of the profit of executry to two legators, and that the executor had but a naked office, found that his oath could not prove to their prejudice, and allowed not that sum which he ought to have allowed; because, though an executor's oath cannot be taken against the defunct's creditors, yet an executor nominate, who expressly instructs by the defunct to give up inventory, his oath may prove against a legator: But specially in this case, where one of the legatars is his own daughter, and where the son and the mother having lived together in one family of the country, the money was paid in parcels from time to time, and they could not have notaries to make discharges, and the son dreamed not of any other succession to his mother but himself. To the *second* reason, That there was only modified to him an L. 100 yearly, for his mother and father's entertainment, though he had proven that they were six in family, and that he had maintained her, and that she had nothing for fifty-four years *aliunde*. The charger, to all, opposed his decret *in foro contradictorio*; and as to the *first* point, opposed the law and constant practise, That the oath of no person can prejudice any other than himself; but in cases where there ought to be witnesses, in which one could not prove. The Commissioners thought they could not loose the decret *in foro contradictorio*; but in regard the matter was so clear, that it would be double payment, they refer it to one of their number to compose.

Eodem

*Eodem die.*M'DONALD *contra* Lord COLVIL.

JOHN M'DONALD, Advocate, pursues the Lord Colvil, as heir to his good-fire, for payment of a sum of L. 10 yearly during John's lifetime, for his service. It was *alleged*, *Absolutor* from any years after the granter's death, because the pension bears, That my Lord Colvil is obliged, and no mention of his heirs, and the election of servants is merely personal, and it bears expressly during his life and service, to the granter, and not to his heirs. The pursuer opposed the pension, bearing expressly to him during his lifetime; which being clear, though heirs were not expressed, yet they were always bound. The Commissioners found the letters of pension to extend no further, than the granter of the pension his own life.

*Eodem die.*The Lady WAMPHREY *contra* the Earl of ANNANDALE.

THE Lady Wamphrey, being served and retoured heir to her father in certain lands holden of the Earl of Annandale, obtained precepts out of the Chancery against him. He suspended on these reasons, *first*, The charger ought to have shown the ancient evidents, that he might grant the new rights, conform to the old. *2do*, The lands were holden of him ward, and he could not be obliged to receive her *ante legitimam etatem*, of 14 years. The charger *answered*, To the *first*, That she needs shew no right, the superior having shewn the same to the inquest, when she was served, and the retour is a debt, in obedience whereof the precept is granted, and his precept will bear *salvo jure*. To the *second*, Oppones the act of union, ratified in parliament, whereby wards are taken away. The suspender *answered*, To the *first*, That the retour was a decret, whereto he was not called, and that though it was answered by the heirs of the brief, yet it expressed nothing of other provisions in the infeftment, which was most material, and ought to be inserted in the new rights; and therefore the old must be shewn. To the *second*, Albeit by the said act wards were taken away, the question was, How far they were taken away? For none could alledge they were taken away absolutely, but that yet the holding remained; though without the former casualties: And therefore that must be interpreted according to the reason and narrative of the act itself, bearing, That all servitudes and grievous bondages of the people of Scotland should be taken away; and therefore, there being in the ward the custody of the vassal's person and minority, his obligation to follow his superior in war and peace, and his obligation to marry any wife his superior should please to offer, without disparagement, or pay her tocher; and that, during the time of his inability to serve in his minority, his superior should have the profits of his lands: Though the custody, service and marriage were taken away by the act, yet the enjoyment of the profits of the lands could not be thought taken away; and, seeing the fee was given out gratuitously, it ought not to be extended beyond the mind of the granter, who might well reserve to himself these years, when his vassal could not serve, and when he needed but his entertainment, which the superior was obliged to give, if he had not blanchland; and if the superior should out the land-ward, then sure he got less price, so thir profits reserved, are but a part of the price: And this being a pri-
vate

vate right of the people, and so ancient, and the most proper feu-duty right, it cannot be taken away; at least it should not be extended further than is expressed in the act of marriage, which is expressly taken away, and the service either in war or peace, but nothing of the profits: And there is a provision in the act of fines to be made to the superior, when the vassal is entered; so that though this were expressly taken away, there ought to be some composition in lieu thereof. The charger answered, That, as to the *first*, she would crave the dispute, and would produce, before extract, the ancient evidents. As to the *second*, she opposes the act of union, and is not obliged to dispute the reason and power of parliament; but seeing it was a clear law, it lifted all question: And as to the distinction, That the ward is not taken away *quoad* the profits, it is groundless, and contrary to the act, that being the greatest bondage, and greatest motive of making the act; and therefore, the act doth not only expressly take away wards without limitation, but also, copulatively, all the casualties of wards and marriage, and there is nothing else that can be meant by these casualties, but only the rents during minority: And the act is so clear, that it bears, that the superior should only have herezelds where they are due, and what express rent is in the *reddendo*, and one year's composition for entering of singular successors; and in the clause thereof it bears expressly, that he should have no more than what is before particularly granted and reserved. As for the matter of fines, it maketh nothing, because it is a thing unknown in our law or tenors; but the act being made in England, and supposing that were copy-holds here as there, having fined either certain or uncertain, at the entry of heirs, what is also provided for, though necessarily, seeing we have no such thing; but cannot be drawn to this case, for there was never any fine due in Scotland to a superior for entry of a vassal holding ward: And as for the justice and reason of the act, there was never any more excellent or noble act, more consonant to reason, and the good of the people, than the ancient tenor and nature of feus, which are the beginning; seeing military service required only, that the vassal should follow his superior in war, when need was, and that he should be trusty and faithful to him; and by consequence he had the custody and education of his son, and, as a tutor, his advice in his marriage; but to lift up the profits of his estate, that was not then known, nor, contrary to his trust, to go about to get the benefit of his tocher, of purpose to offer him a wife most unfit for him, and undesired by him; but these crept in by course of time, and the power of the superiors; and therefore are justly now repelled, and there remains nothing but acknowledgment and fidelity to the superior: So that the tenor should yet bear the *reddendo servitia debita et consueti*; yet by these *servitia*, neither the marriage nor the profits during minority, nor the obligation to follow the superior in war, which the States find inconvenient, are now understood, but only acknowledgment and fidelity. The Commissioners repelled the reason of suspension, and found the ward, even as to this, particularly taken away.

Balfour, Clerk.

July 10. 1658.

METRIST contra MAXWELL.

MAXWELL, being charged to pay a sum to this Metrist, he suspends on payment made of a part of it, by poinding his goods, which he produced. *Alledged*, The prices were highly exorbitant; and therefore offered to prove by witnesses, that the goods poinded were overprised, and de-

fired they might be examined *ex officio*. It came to be disputed, if witnesses could be examined *ex officio*, on the prices of goods poided, contrary to the poiding, which they found they would not sustain in prejudice of the poider.

Eodem die.

A L L A N contra Lord S P E N Z I E.

ALLAN pursuing a poiding of the ground against Lord Spenzie's tenants, my Lord's creditors compear, and *alledge*, No process, because my Lord is a forfeited person; and so he behoved to take the ordinary way of forfeited persons creditors, which was to have his debts allowed him by the committee of claims, and then to take land from the trustees. *Answered*, The forfeitures are taken away by the act of restitution. *Alledged*, The restitution is conditional; the creditors paying the proportion of their fines, which this pursuer has not done. They found his not payment of his proportion of the fine could not stop the poiding, &c. by the act of restitution of forfeitures.

Act. Ellies.

Alt. Fletcher.

Eodem die.

B A L N A V E S contra H A Y.

MR ROBERT BALNAVES, minister of Tuppermoore, having obtained a designation from the presbytery of Perth, of a piece of land belonging to Mr Francis Hay of Bussy, for his kine and horse-grass, conform to the act of parliament 1649, he thereupon charged Mr Francis to remove; who suspended, and raised reduction upon these reasons, *first*, That the charger had already a glebe, containing as much more than 4 acres, as might suffice his kine and horse. *2do*, That the lands designed were corn-fields, and were not proper for grass. *3tio*, That the lands designed were parsonage lands; and that there were kirk-land lying adjacent to the glebe more east. The charger *answered*, to the *first*, He opposed the act of parliament, ordaining two kine and a horse-grass, besides the former glebe, without distinction, whether more or less than four acres. To the *second*, There is no limitation of the said act, whether it be all in lands or not, but sure what is arable may be grass. To the *third*, The act makes no distinction out of what lands it be, whether it be of kirk-lands or temporal-lands as former acts of parliament did in relation to glebes; but, by the contrary, the only exception of the act is incorporate acres, which confirms it *in non exceptis*. The suspender *answered*, That tho' the act of parliament did not fully clear and determine the way of designation, and relief of the said kine and horse grass, as is clear by the act, yet it being, in effect, an additional glebe, ought to be regulate by the former acts of parliament anent glebes; and these extend thereto, at least, as to the lands to be first burdened by the designation, it being more reasonable that the kirk-lands, where they are contained, should be designed, then, temporal lands; though as to the matter of relief, it may deserve a serious consideration, whether it be out of the whole lands of the parish or not; seeing the parliament leaves not the old way, but reserves it to the commission for plantation. The Commissioners repelled the first reason, and found the third reason relevant; for they thought, as to the designation, the kirk-lands there east should be first burdened.

July

July 13. 1658.

The Earl of NITHSDALE *contra* the Countess of BUCCLEUGH.

THE Earl of Buccleugh having apprised from the Earl of Nithsdale, the barony of Logan and others, Nithsdale useth an order of redemption before the legal expired; and this Earl, having granted a bond to Dirleton, who thereupon obtained adjudication thereof from him, of his father's whole estate, which being assigned to the Earl himself, he was infest thereupon, whereby he pursues a declarator of redemption against the Countess of Buccleugh, as heir to her father; wherein it was *alleged* for the Countess, There could be no declarator, unless the Earl, who assigned the sum *suo periculo*, would now lift the same, and consign it, and now offer it at the bar. The pursuer *answered*, That all he was obliged to do, was only, that if the consignator were freed, or *insolvendo*, he should be liable; but yet he offered, that in respect Buccleugh, after the redemption, had entered in possession, he was willing to compt and reckon with the Countess, and to produce what sums should be found resting to her, before extracting his declarator. The Commissioners repelled the defence, in respect of the reply, and offered and declared, superseding the extract until the compt and reckoning was perfected; whereupon the auditor gave in these two queries to the court, *first*, Whether the Countess, having both right to the apprising, and also to a wadset, should compt for the rent of the wadset-lands, in satisfaction of the apprising, or if she might ascribe them to the wadset? *2do*, As to the matter of comprising, Whether the appriser should compt according to the rent of the lands paid, according to the time of the appriser's entry, and several years before, or according to the rent the appriser got for the lands yearly? Whereupon, being heard *in presentia*, anent the first, it was *alleged* for the appriser, That the craving diverse rights in her person, might maintain herself in possession, and ascribe her intromission to any of them. The pursuer *answered*, That though she might make use of any of the rights to maintain the same against any third party; yet here both rights flowing from the pursuer, and neither being quarrelled or invalid, but as satisfied, she could only ascribe her possession to that right by which she obtained possession, which was upon the apprising, as is clear by the decret of removing produced. *2do*, Though she had obtained possession without process, and so her entry had not appeared upon that right, yet here she behoved to ascribe it to the apprising, as *jus nobilius*, and *duci* or *sors*; otherways the wadset or apprising for his back-tack-duties, as is ordinary, and intromitting with as much as would satisfy the apprisings, might ascribe the same to his wadset, whereby the apprising would expire and become irredeemable, and is in personal rights payment of a part, not being declared by the payer in that sum, the law declares it to be *in duriorum sortem*; so the like reasons hold in these real rights, but being for security of sums. And lastly, the wadset is not proper, because it hath a back-tack, granted by Buccleugh to one Maxwell for three years, and longer, during Buccleugh's pleasure, signified in writ to that Maxwell and the Earl of Nithsdale, whereby it is clear, that this back-tack was to Nithsdale's behoof; and it was never declared, that the benefit of the tack was expired. The defender *answered*, That there was nothing to hinder her, to make use of any other right she pleased; and that the back-tack made not the wadset improper, or to need declarator, being not to the wadsetter

setter directly, nor during all the time of the wadset, but for three years, and thereafter was not precarious during the Earl's pleasure, which he declared by letters of intimation against the Earl, being out of the country, and needed no farther. The Commissioners found the apprisers intromission to be ascribed only by the apprising, and ordained them to compt for the wadset-lands: As to the second query, the defender *alleged*, That, by the act of parliament 1621, in apprisings, apprisers are declared comptable only for what they intromitted with, and not for what they might intromit with; and there is no law nor reason to compel an appriser meddling by his own right, and but to get payment of his just debt against his delaping creditor, who might redeem him when he pleaseth, yet to be comptable for exact diligence as a factor, being only liable *pro dolo et lata culpa*: So that that if the pursuer will alledge *dolo*, so that the defender let down the rate of the land, or let it go waste, she cannot be liable for more than she received; but especially here, where it is offered to be proven, that the same diligence was used to set the apprisers lands, that was used to set the defender's lands lying contiguous thereto, or their quarters; and that whenever the apprised lands were given down, her own lands were also given down proportionally. The pursuer *answered*, That though, by the act 1621, apprisers were not obliged to enter in possession of the apprised lands, or of more of them than they pleased, yet as to such whereunto they did enter, both by law and many decisions, an appriser is used to use diligence; and if the land fall waste, he must either labour it himself, or intimate to the debtor, that he may provide tenants for it; otherwise, if the appriser's own assertion, that he behoved to give it down, were sufficient, unless fraud were proven, apprising would never expire, and both the debtors and posterior apprisers be ruined: But here, the defender does not so much as shew the lands were given over by the tenants, much less, that it was intimated to the Earl of Nithsdale; and therefore the Earl's rental must be the rule, and what defalcation the defender shall shew of any year, upon inevitable reason, being proven, the same may be sustained accordingly. The defender *answered*, That he could not intimate to the Earl of Nithsdale, because he was forfeit, and out of the country. The Commissioners ordained the compt to proceed according to the rental, that the pursuer should prove the lands to be set for at her entry, and several years before, allowing such deductions as the auditor should find reasonable in the particulars, and should be instructed: And the Commissioners would not allow the defender a joint probation of the rental, though she offered to make use of the pursuer's own Chamberlains.

Balfour, Clerk.

Eodem die.

HEPBURN of KENNISTON *contra* the Viscount of
KINGSTON.

FRANCIS HEPBURN of Kenniston being infest in the land of Lufflot, Walkinkye, and mill-lands thereof, with 15 souns gras out of the pasturage of the muirs of Halls, used and wont; and alledging, that he was in possession of five souns gras of Tripaine, as a pertinent of his mill-lands, he thereupon pursues a contravention against the Viscount of Kingston, for molesting him of his possession; and who also raised the like against him; and both being restricted to molestations, the Viscount *alleged*, That Kenniston was infested in 15 souns gras used and wont, whereby it must be regulate, according

according to the former possession; and offered him to prove, that a part of the pasturage as they came about yearly was reserved for the plough-goods; and that he was in constant custom to debar Kenniston from pasturing his sheep thereupon: And for the other servitude not being special seven years possession, could never infer it as a part of the mill-lands, but only 40 years possession. Kenniston *answered*, That, in fortification of his right and infestment, he offered him to prove, that he was in constant possession of pasturing his goods through the whole muirs of Hall's, without any reservation, and that he was in possession of the other, 40 years peaceably before the years in question; and, being *in libello*, craved to be preferred to the probation. Kingston *answered*, That he was also more pregnant, by alledged debarring, and craved, at least a joint probation. The Commissioners granted commission to the sheriff of the shire to cognosce upon both parties' possession by an inquest, and to lead witnesses.

July 19. 1658.

INNES *contra* TENANTS of BALNAGOWAN.

JOHN INNES, having apprised some lands from the umquhile Laird of Balnagowan, pursues the tenants for mails and duties. It is *alledged* for Mr Thomas Ross, one of the tenants called, *Absolutor*, because he offered him to prove; that he stands publickly infest in the lands libelled, upon a right prior to the pursuer's apprising, *viz.* an apprising deduced at the instance of the Laird of Tofts, by virtue of his right. The pursuer *answered*, The defence ought to be repelled, because he offers him to prove, that Tofts's apprising was satisfied by Balnagowan the common debtor, and that the same was known to be satisfied by the defender before he took right thereto from Balnagowan. The defender *answered*, *imo*, *Non relevat* to take away his infestment without reduction. *2do*, *Non relevat* to be proven by his private knowledge; for private knowledge is not respected in prejudice of any party's right; but so long as the defender saw Tofts undenuded legally, he might lawfully take a right from him. The pursuer *answered*, That a comprising being but a surety for a sum, may be singularly taken away by alledgeance of satisfaction, either by payment of mails and duties, or otherways; and as to the private knowledge, though it will not prejudice the knower to make an imperfect right, which he knew to be somewhat valid, as a disposition without infestment, or a prior assignation, without intimation granted to another party, though they were known to another party, the posterior appriser will not prejudice him; yet if the right acquired be truly extinct, and he knew the same, there it doth prejudice it: For the alledgeance is unquestionably relevant, the apprising satisfied, and the probation is also relevant, being by his own oath; and especially, that he knew at the time of his acquiring. The Commissioners repelled the defence, in respect of the reply.

July 16. 1658.

MAXWELL *contra* HERRIES.

MAXWELL of Drumcoultran being deferred by Robert Herries in executing poinding, who was thereupon convicted criminally, and the first of his goods adjudged to Maxwell: He pursues for making the same forthcoming, especially the third part of a bond belonging to Herries's wife; and so to Herries *jure mariti*. The defender *answered*, *Absolutor*, Because the

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bond

bond was heritable ; and so the wife had no share of it. The pursuer *answered*, That it was made moveable by a charge, yet by the act of parliament, bonds bearing a clause of infeftment and annualrent are declared moveable, but *excludendo fiscum et relictam*. The pursuer *answered*, That the act of parliament did only declare, that bonds, by virtue of that clause, should be moveable, who had children and excludes the relict from the benefit of that act, but not from the benefit of such bonds, in case they become simply moveable, as by a charge, or by the death of the creditor before the time. The Commissioners found the bond foresaid to become moveable by the charge or requisition as to the relict and others.

Eodem die

GORDON *contra* CRAICHLAW.

WILLIAM GORDON of Craichlaw, as assignee constitute to Mr Hugh Cathcart, who was donator to the non-entry of the barony of Craichlaw, through the decease of William Gordon of Craichlaw, and did obtain thereupon general declarator, doth pursue in a special declarator, for the mails and dutys since the general declarator ; and particularly of the lands of Barney as a part of the barony. It is *alleged* for the defenders, *Absolvitor*, because they are heirs or apparent heirs to William Gordon of Barney, who was infeft in the lands of William Gordon of Craichlaw ; which is ratified by him, and by the same pursuer, his oye, whom he hath also charged to enter heir to the superiority, as apparent heir to his goodfire ; and, upon his refusal, they have obtained themselves publickly infeft : And so the pursuer, not being apparent heir, who is *in mora*, and lies out, the defenders cannot be liable to him, who have consented to the right, which will hereby be infringed. The pursuer *answered*, *Non relevat* ; for as to his consent it can be drawn no farther, than for any right he then had ; but this is a supervenient right since, flowing from a stranger : And as to the public infeftment, first it is but *supplendo virem* of the immediate superior, and so puts the defenders in no better case, than if they were infefted by Craichlaw, which would not purge Craichlaw's non-entry : And that the pursuer lies out and infefts not himself, *Non relevat*, because he is not heir to his goodfire, nor no way represents him. The defender further *alleged*, *Absolvitor*, Since the act of union taketh away wards and non-entries. The pursuer *answered*, That that act can only reach unto non-entries, falling after this date thereof, but not such as fell before and were declared. The Commissioners found the last defence relevant to take away the effect of the non-entry for years after the act ; and repelled the alledgeance of the pursuer being apparent heir, and consenting ; but the pursuer past from the year, since the defender was entered by the protector upon his refusal.

Eodem die.

KATHRINE PARK *contra* JANET M^cMATH.

THE said Kathrine having obtained decret before the Commissaries of Edinburgh, against Janet M^cMath, as executrix to umquhile William Dick her husband ; she suspends and raises reduction upon iniquity, first, because the Commissaries repelled this relevant reason, That the testament was exhausted. 2^{do}, Because they repelled this relevant defence, That the said Janet ought to have retention in her own hand for fulfilling of her contract of marriage, whereby she is provided to 500 merks by year, in respect of

of this relevant reply, that she had apprised the lands belonging to her husband's heirs, and by virtue thereof, was in possession; which was no way relevant, unless it had been alledged, That by an intromission she was satisfied, albeit it was alledged, that she possessed the lands apprised by her contract of marriage; for the lands being liferented by Sir William Dick, she apprised for the bygones, and after his decease by her contract. The charger *answered*, That the decreet was just, and the reply of the apprising and possession *non relevant*, especially seeing nothing was objected, and that after possession, the appriser could not poind moveables, nor could not arrest, and so could not retain; and whereas it is *alledged*, that the suspender possessed by her contract of marriage, that was competent and omitted; and by her contract she has option either to take herself to the bond of personal action, she could not return to her infesment. The Commissioners found the said reasons of reduction relevant and proven by the decreet; and therefore turned the same into a libel.

Brown, Clerk.

Eodem die.

B I L T O N contra the Magistrates of A Y R.

JOHAN BILTON pursues the Magistrates of Ayr, for doing wrong, in hindering him to unload and sell salt in their burgh; and that it may be declared, that he had liberty so to do. The defenders craved that he would condescend what liberty he craved to be declared, whether the common freedom of the people, or the privilege of a burges; for if the common freedom, then they offered them to prove, that by the law and customs of burghs royal, none but the burgeses can export or import salt; if as a burges, then the defenders alledged no wrong unless the pursuer *alledged*, That he shewed and manifested to them by his cocket, or otherways, that he was a burges; and if the pursuer *alledge* the privilege of *mercatus miles* by the proclamation, that all soldiers should have free traffick in all ports not relevant, unless it were *alledged*, that he shewed and instructed he was a soldier. *2do*, Though he shew the privilege of a burges, yet he might be excluded from the benefit of sale, by the custom of the burgh, unless he had offered his goods at a reasonable rate unto the burgh, before he had broken bulk. And it is offered to be proven, that he broke bulk, before he made offer, and that he made it elusory and unreasonable, by offering the salt at L. 15 *per* boll, and that he sold it for less price to others. The pursuer *answered*, That he was wronged in his privilege as burges of Aberdeen, and as having been soldier, which he needed not to have shewn, but when he entered his goods, the burgh might have quarrelled him, if he had not that privilege. *2do*, If need be, he offers him to prove, that he had been soldier and was burges of Aberdeen. *3tio*, He offers him to prove, that, by the custom of burghs, if any merchant enter at any port, and break bulk there, he may go to any other burgh and vend a parcel without any offer. The defenders offered to prove the contrary. The Commissioners found the first defence relevant, and also the second, upon the proclamation and act, which they found not to extend to trade, importing or exporting, but to soldiers exercising trade in the town where they live, and found the third relevant, That the defenders might debar the pursuer, unless he had not only shewn, but also by cocket, a burges ticket, or otherways instructed; that he was a burges, and therefore assilzied from the libel.

Downie, Clerk.

*Eodem die.**ALLAN contra the Earl of AIRLY, &c.*

JEAN ALLAN being infeft in an annualrent of L. 60, out of the lands of Sandyford, pursues a poinding of the ground: Compearance is made for the Earl of Airly, and Sheriff-Clerk of Forfar, who *alleged*, that the lands belonged to the Lord Spenzie a forfeit person, and that he had paid his fine; and by the act of restitution, it is declared, that they should have right to his land, before all others his creditors. The pursuer *answered*, That the act could only be extended to personal creditors; and as to the pursuer's real infeftment, it could not be prejudged. The Commissioners found the restitution, only to prefer the creditors paying the fine to other personal creditors, and therefore repelled the defence, and decerned.

*Eodem die.**BRUCE contra the Earl of KINCAIRDINE and Sir JAMES LUMSDAIN.*

THOMAS BRUCE of Blairhall, having obtained decret against the tenants of the lands of Kincardine and others, for abstracted multures from his mill of Shyres-mill, the said tenants and the Earl of Kincardine and Sir James Lumsdain their master, have raised suspension and reduction on these reasons, *first*, That this relevant defence was repelled by the Sheriff, *viz.* That the decret proceeded upon a citation not upon 15 days. *2do*, The Sheriff repelled this relevant defence, That the charger could have no right to the multures of corns that suffered waters within the thirl, because he was not infeft therein. The charger *answered*, That both were justly repelled; for the first is repelled in respect of his reply, whereby the pursuer opposed his executions, which not being produced, it cannot be inferred, that they were not cited upon lawful days. To the *second*, repelled in respect of this reply, That the pursuer opposed his infeftment, which, although it bore not the multures of *investa et illata*, or which have tholed fire and water, yet bears the equivalent, *viz.* The multures both insucken and outsucken: Insucken a peck of the boll, outsucken a peck of six firlots. The defender *answered*, That that clause cannot import the multure of *investa et illata*, but by outsucken is only meant the grain of these who dwelt without the sucken. The pursuer *answered*, That that cannot be the meaning, for it is a contradiction to thirl them that were without the sucken; and therefore outsucken must signify corns growing without the sucken, and brought within the same. The Commissioners repelled the two reasons, in respect of the replies, and found that the outsuckens did signify corns growing out of the sucken or *vesta et illata*.

*Eodem die.**EDGAR contra the Earl of TULLIBARDINE, &c.*

MARGARET EDGAR pursues the Earl of Tullibardine, as heir of line to the Earl of —, and Lord Balvaird, and heirs of tailzie to umquhile Mungo Viscount of Stormonth, for paying of a debt of his. The heirs of line offer to renounce. The heirs of tailzie *answered*, No process against them, until the heir of line be discussed, which, by his renunciation, is not sufficiently discussed, until adjudication be obtained. The pursuer *answered*, *first*, That he ought to have decret *simpliciter* against the heir

heir of tailzie, unless they condescend and show, that the heir of line has an inheritance to which he may succeed; for seeing he renounces, his person is free, and if there be no estate provided to the heirs of line, there can nothing be adjudged. The Commissioners decerned the heirs of tailzie; but with this provision, that, before execution against the heir of tailzie, the pursuer should discuss the heir of line by horning and registration, if he renounced not, and by apprising or adjudication of any lands the heirs of tailzie should show competent to the heirs of line, by apprising or adjudication. It was further *alleged* for the heirs of tailzie, *Absolvitor*, because by the tailzie itself, made by David Viscount of Stormonth, and in all infestments following thereupon, it is provided, that it shall not be leifome to any of the heirs of tailzie to alter the same, or to do any deed that may infringe it, in whole or in part; and so this debt, contracted by Mungo Viscount of Stormonth, first heir of tailzie, cannot affect the lands, or heirs of tailzie, who entered *qualificatè* with that provision: And the pursuer should have known the condition of the party with whom he contracted, that he could not burden the heirs of tailzie. The pursuer *answered*, That she opposed the provision in the tailzie, which, though it bear that it shall not be leifome to the heirs of tailzie to do any thing in hurt and prejudice thereof, yet doth not bear that such deeds shall be null; but that the right of that heir contravening shall be null, and the next persons that would have right by the tailzie shall have place: So that if the defender had forborn to succeed to Mungo, and had annulled his right upon that clause irritant, and entred to David, there might have been a question; but seeing they have entred heirs to Mungo, and, in law, are become one person with him, they cannot quarrel his deed; Nor can they succeed to him *qualificate*; for *additio hæreditatis est actus legitimus, nec admittit diem nec conditionem*; and there was no necessity for the pursuer to know any such persons. The Commissioners repelled also this defence; and found the heirs of tailzie liable as before.

July 18. 1658.

BILTON contra the town of AYR.

IN the process *Bilton contra* the town of Ayr and theirs against him, *alleged*, By the custom of merchants, any strangers breaking bulk of their goods within their jurisdiction, ought not to go elsewhere and sell them in some other part. Some other things were here *alleged* worth the adverting to, which I observed not, and therefore must inquire.

Eodem die.

EDGAR contra Lord STORMONTH.

DAVID Viscount of Stormonth tailzies his estate to Mungo Viscount of Stormonth, with this provision, that he should contract no debt in prejudice of the tailzie. Mungo borrows 2000 merks from Margaret Edgar. This Lord as heir of tailzie to Mungo contractor of the debt, is convened to pay that sum. *Alleged*, No process against the heir of tailzie, 'till the heir of line, *viz.* My Lord Tullibairdine be first discussed. *Answered*, No necessity, of that, unless you say the heir of line has succeeded to an estate, and *lucratus est*, and they condescend on it. This was found relevant. Then *Alleged*, He cannot be liable for any debt contracted by Mungo, because he had no power to contract debt in prejudice of the tailzie, being conditional, as said is, *Answered*, my Lord Balvaird as the person next in the tailzie to

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Mungo,

Mungo, should have raised a declarator of tinsel of the tailzie, by the forfeitor of the condition ; but having served himself heir to Mungo granter of the bond, he must be liable in law to this debt, *cum additio hæreditatis sit actus legitimus, qui nec recipit diem nec conditionem.*

A&A. Fletcher.

Alt. Wedderburn.

Eodem die.

ALL Wards, marriages, non-entries fallen since the act of Union are found to be discharged.

Eodem die.

BRUCE contra the Earl of KINCAIRDINE.

IN the case betwixt Bruce of Blairhall, and the Earl of Kincairdine, about the lands of Kincairdine, thirled to the mill of Blairhall, out-sucken and insucken : It was found that insucken comprehends all corns growing within the lands thirled or grist ; and out-sucken, *omnia inuenta et illata*, tho' not growing, if it tholl fire and water, within the grist.

A&A. Gilmore.

Alt. Gilmore.

Eodem die.

A Minor under pupillarity cannot renounce to be heir, being charged, without he be authorized by tutors, &c. for it must be a valid renunciation, which it cannot be without them.

July 20. 1658.

WILKIE contra BELLS.

JAMES WILKIE and his father, as administrator of the law to him, as only bairn and nearest of kin to Elisabeth Bell his mother, who was one of the sisters and executors confirmed to Patrick Bell her brother, convenes his mother's two sisters, Margaret and Janet Bells, the other executors confirmed to their brothers, for making compt and reckoning, and payment to him of the moveable goods and gear pertaining to the said Patrick their brothers, and fallen and appertaining to him as only bairn, &c. *Alleged*, No process at his instance against them, because the goods claimed were not *in bonis defuncti*, viz. his mother ; unless he say the testament was *executum* in his mother's lifetime, seeing the benefit of the brother's testament, (wherein the mother was an executrix) *quoad omnia executum*, accresces to the sisters surviving. *Answered*, No necessity to say *executum* in the mother's time ; because the case was not alike here betwixt a stranger executor, and an executor who was nearest of kin ; because his mother being the defunct's sister, she had *duplex jus*, viz. *qua* nearest of kin, which is *jus sanguinis* ; *et qua* executor, which being but a naked office not execute in the executor's time, accresces to the executor surviving : for by the act of parliament, one who is nearest of kin may call to an account the executor-confirmed, being a stranger, and may discharge him ; so his mother being nearest of kin to her brother, it is *jus quesitum* to the pursuer to call the other executors to an account ; even *quoad omnia executum*, and that *jus sanguinis* is transmitted by the mother to the pursuer, especially seeing she *adivit hæreditatem*, by confirming the testament. *Answered*, *Imo*, Nothing can be said to be *executum* but what is *executum* ; and if there were no other executors surviving, there behoved to be a dative *quoad non executum*, and that the benefit and office of executry accresces to the rest of the executors surviving *quoad omnia executum*. As to the act of parliament, it is only against executors nominate, who may be called to an account by the nearest of kin, but not executors dative, and cannot be

be extended beyond its sense and letter. The Commissioners repelled the defence in respect of the reply, and found the goods to be *in bonis defuncti*, being confirmed, though not execute.

A&t. Wedderburn.

Alt. Gilmore.

Eodem die.

NICOLSON contra Lord PHILORTH.

SIR THOMAS NICOLSON pursues the Lord Philorth, as heir to his father, who was cautioner to the Earl of Marishal, to pay him the sum of, &c. *Alledged*, The debt was prescribed, not being pursued within 40 years. *Answered*, Interrupted within the 40 years, by payment of annualrent from the principal debtor. *Replied*, That payment cannot take away the benefit of prescription from the cautioner, who was never called nor cited for this debt these 40 years. Here fell in the question, if an interruption of prescription against the principal, works also against the cautioner, when alleged the prescription did interrupt against the cautioner, the principal paying annualrent, because it is *accessorium* to the principal, *et sequitur natura principalis*; and so must interrupt as well *quoad eum*, as *quoad* the principal debtor; and the reason is, because prescription is introduced, *ob supinam negligentiam creditoris, et ne nomina debitorum perpetuentur in mobilibus et immobilibus; ut domina rerum sint certa*; for here *non est supina negligentia*, since he has got payment of annualrent from the principal within the years of prescription: For the case was put as if one were infest in principal and warrandice, and upon his infestment had craved for the mails and duties of the lands principally dispoed, till the year 1639, and that the principal lands were evicted; it was not proper to alledge the right *quoad* the warrandice-lands is prescribed, because not pursued within these 40 years, the party having pursued the tenants of the principal lands within the years of prescription. The Commissioners found the prescription interrupted against the cautioner by the principal's paying of annualrent. *Vid. Leg. ult. C. de duobus reis.*

A&t. Wedderburn et Chalmers.

Alt. Gilmore.

Eodem die.

BLAIRHALL contra KINCAIRDINE.

IN the foresaid action betwixt Blairhall and Kincairdine. *Alledged*, No process for any greater measure than the 20 curn, because prescribed, there never being any such action for the 16 curn raised these 40 years bygone. *Answered*, He opposed his infestment *cum astrictis multuris*, and their constant coming to the mill within the years of prescription. *Answered*, Their constant coming *nullo modo* relevant, unless they say they came and paid the multure libelled. Likeas, the defender, in fortification of his right, offered him to prove, that he has been in use to pay no more but the 20 curn. *Answered*, Their coming to the mill was sufficient to interrupt prescription, and if they paid less, that was *meri arbitrii*, and must not prejudice me, unless it were alleged, that, *per contrarios actus*, he could pay no more; and if sentence had been recovered against him for no more: For the case was put, as if one infest in the pasturing of 16 fums grass, had never pastured but in 6 or 7; shall that prejudice him of the rest? The Commissioners ordained both parties to produce their writs before answer.

A&t. Gilmore.

Alt. Wedderburn.

Eodem die.

Eodem die.

IN a process betwixt the Lady Whitekirk, heir, and an assignee, it came to be debated if the Lady's heir had right to a bond assigned, with reservation of the cedent's liferent, and power to dispoise thereof at any time before his decease. The Lady Whitekirk cedent, having, after the assignation, taken a bond of the debtor, bearing infestment, in corroboration of the former bond assigned, which was moveable. Where, the Commissioners, after some debate, preferred the assignee, and found not the heritable bond taken in corroboration of the bond assigned any way a revoking of the assignation.

Aët. *Gilmore.*Alt. *Gilmore.*

July 20. 1658.

EWINGS contra Sir CHARLES ARESKINE.

SIR CHARLES ARESKINE obtained a declarator of redemption of the lands of Cockspen, against John Ewing and Janet Ewing his daughter, and removing thereupon: they pursue a reduction of both upon several reasons, *first*, That the order was used against the said John Ewing as heir to his father, by which title he had no right, but only as heir to his mother; and so the order being null, all falls *in consequentiam*. The defender *answered*, That seeing they used the order against the right person, and who was heir apparent to the mother, the expressing of him as heir to his father cannot annul the order. The Commissioners repelled this reason. The second reason is, That the Earl of Mar, granter of the wadset, obliged himself, his heirs and successors, not to remove the wadset, till he satisfied him of his bigging and planting; 'till which be done by Sir Charles, the Earl's son and assignee, he cannot be removed; seeing the said bond is in effect an addition to the reversion, and bears that it should be holden as repeated therein. The defender *answered*, That this is only a personal obligation, and no reversion; for the lands might well be redeemed, and that bond fulfilled, by suffering him after redemption to possess. *2do*, Though a reversion, yet it cannot oblige the defender as a singular successor, neither being as heir, or apparent heir to his father, but acquiring for a cause onerous, especially seeing it is not registrate. *3tio*, If it could oblige him, the price of such melioration was belonging to the defender himself by virtue of the pursuer's gift of single escheat and liferent. The pursuer *answered*, That his reason stands most relevant; for the bond, being provided to be a part of the reversion, is valid, though not registrate, because it was granted in 1608. before the act of parliament for registration of reversions. The defender *answered*, That also at that time there was a register appointed for reversions, though it ceased from the year 1609 to 1617. And as for the alledged gifts, this cannot fall under the same, because it is a part of reversion, which neither falls under double nor single escheat. The Commissioners repelled this reason, in respect of the answer, and found the meliorations to fall within this gift.

*Eodem die.**BOSWELL contra the Earl MARISCHALL.*

MARGARET BOSWELL pursues the Earl of Marischal, as heir to his father, for payment of 150 merks of annuity due to her by her father's bond. The defender *alledged*, That he ought to have allowance of the publick burdens, this being an annualrent, or otherways it behoved to be retrenched according to the act of parliament. The pursuer *answered*, It could

could not be restricted, seeing it was not the annual of any tack; neither could it bear any publick burdens, seeing it related not to lands, or any real right, but was a mere personal obligation: And whereas the general clause of the act of parliament 1646, bears, That it is the meaning, that all persons having any yearly rent should pay public burdens; that can only be meant that such rent is a rent of land or relative thereto, and not to a personal bond for a yearly payment. The Commissioners repelled the defence, and found not the act of parliament to extend to such bonds merely personal.

July 21. 1658.

WILKIE contra BELLS.

JOHAN WILKIE, as executor confirmed to Griffel Bell his mother, pursues her two surviving sisters for payment of his mother's third of the goods of umquhile Patrick Bell their brother. The defender *alleged, Absolvitor*, because the pursuer's mother having died before execution of her brother's testament, the goods remained *in bonis* of the defunct's brother, and both the office of executrix, and all benefit thereby, accresced to the two surviving sisters; and the deceased sister, not having made the goods her own by execution, could not transmit the same to her nearest of kin, *quia in mobilibus nulla jus representationis*. The pursuer *answered, Non relevat*; for in executry there are two things, the office of execution of the defunct's will, and the succession to the defunct's moveables: And as to the office, if it be not executed, all interest therein and benefit by the law therefor ceaseth; and accresceth to the surviving executors; and if there be none, there must be a new confirmation *ad non executam*; but beside this, there is a right of the nearest of kin, whereby *jure sanguinis*, they succeed to the defunct, and enjoy his moveables, as the heir doth his lands; and as though the heir die unserved or entered, he transmits the heritage to his successor, so if the nearest of kin *adeant hæreditatem mobilem*, either by confirming themselves executors, or by pursuing the executors nominate, being a stranger, or the executor-dative, whereby the goods becomes theirs, and they transmit them to their nearest of kin; and though they die *ante quam mediam*, as aforesaid, their nearest of kin cannot succeed to the first defunct, but only the survivors, which is the difference betwixt heritable and moveable; where a daughter, and a son of another daughter, though his mother never entered, yet, *jure representationis*, succeeds to his good-fire with his mother's sister; but in moveables, he could not succeed unless his mother had owned the succession as aforesaid, in right of succession of the nearest of kin, is several from the office; as is clear, first by the act of parliament 1617, anent executors, whereby executors nominate, being strangers, are accomptable to the nearest of kin; whereby it is clear, that the law of the nation acknowledgeth a right to the nearest of kin, separate from the office, and where they have it not; and seeing there is neither law nor practise in the contrary, justice and reason requires, that the defunct's sister, so entering her children, should have her share. The Commissioners repelled the defence, and found, that, by the defunct's sisters entry by confirmation, her nearest of kin had right to her share, and the same did not accresce to the survivors.

Eodem die.

Sir THOMAS NICOLSON *contra* the Laird of **PHILORTH.**

SIR Thomas Nicolson of Carnock, as heir to his father, pursues the Laird of Philorth, as representing his Grandfather, to pay the sum

of 10000 merks due by bond by his grandfather, as cautioner for Earl Marishal the defender. *Answered, Absolvitor*, because the bond was prescribed, not being followed within forty years, conform to the act of parliament. The pursuer *answered*, That the prescription was interrupted, by payment of the annualrent, within 40 years, conform to the act of parliament. The defender *answered*, *Non relevat* against the cautioner, unless it were interrupted *quoad* him, by payment made by him for the principal paid, and thereby, as to him, the prescription was interrupted, yet the cautioner's bond being distinct and several might be prescribed, as well as it might be discharged, though the principal obligation stood; for if neither had paid, but interruption, by a citation against the principal, that could not have interrupted against the cautioner, who was not called; so neither can the principal's payment interrupt as to the cautioner. The pursuer *answered*, That *hoc ipso* that the principal obligation stood, and was not prescribed, the accessory obligation of the cautioner stood also, unless it were specially discharged; and the pursuer needed not pursue the cautioner, seeing he got his annualrent, at least some part of the time; but the cautioner should have called for his own relief, if he had a mind to be free. The Commissioners repelled the defence of prescription, in respect of the reply of payment of the annualrent within forty years, though only by the principal.

Eodem die.

DUNBAR contra Heritors of the shire of MURRAY.

DUNBAR of Grangehill, having charged the Heritors of Murray for his charges as Commissioner for the parliament 1646, they suspended upon this reason, That, by the act of his election produced, the freeholders immediately before, antecedent to the election, agreed and enacted the Commissioner then chosen should have no charges. The charger *answered*, Any such act *non relevat* to take away an act of parliament, unless the charger had consented. The suspender *answered*, The charger consented, in so far as being one of the holder's collectors, the major part behoved especially to consent, his consent is presumed, unless it be made appear that he dissented. 2^{do}, His consent is clear, because he accepted his commission in that very act of election, including this quality. The Commissioners found the reason relevant and proven, by the act of election produced.

July 22. 1658.

VISCOUNT of DUDHOPE contra the MARQUIS of ARGYLE.

VISCOUNT of Dudhope pursues the Marquis of Argyle for intromission in his lands of Auchquill, which are a part and pertinent of his barony of Glastrye, and for violent profits thereof, since the year 1647; but because the defender had been more than seven years in possession, he restricted the same to the ordinary profits and repossession. The defender *alleged, Absolvitor, in hoc judicio possessorio*, because he stands infest in the lands libelled, and, by virtue thereof, in possession since 1649, above the space of seven years; and therefore, in this possessory judgment, he cannot be liable till his right be reduced. The pursuer *answered*, that the defender cannot have the benefit of a possessory judgment, because he was in possession 20 years before, and did not relinquish his possession; but the lands being wasted by Alaster M'Donald, the defender unwarrantably entered in; and to his

his possession was not lawful. The defender *answered*, That he might lawfully enter to the void possession, by virtue of his infeftment. The Commissioners repelled the defence, in respect of the reply. The defender then further *alleged*, *Absolvitor* from the bygone mails and duties, *quia bona fide possessor facit fructus prescriptos suos*. The pursuer *answered*, That he was not *bona fide possessor*, having entered unwarrantably, by reason of the devastation. The defender *replied*, That he had done no diligence to interrupt *bona fide*. The pursuer *answered*, That he could not interrupt, there being no judicatories from 1649 to 1652; and that he was prisoner forfeit and sequestrate in the year 1654. The defender *answered*, There was nothing to hinder him to have entered action 1649 and 1652, or thereafter. The Commissioners found the defence relevant, and assoilzied from the bygone mails and duties before intending of this cause.

July 23. 1658.

The Burgh of *IRVING* contra the Burgh of *KILMARNOCK*.

THE Burgh of Irving, having charged the burgh of Kilmarnock to desist from using merchant-trade proper to the Burgh-Royal, they suspended, and *alleged*, That the charge is general; the chargers having given in a special charge, insisted upon that member thereof that the suspender's should desist from topping of wine, wax, lint, and the like, conform to the sixth act of parliament King James IV. and to desist from keeping of ships, conform to the act 1633. The suspenders *alleged*, That they were created in a free burgh of barony, in favour of the house of Boyd, by the King, and ratified in parliament, with an express power to top these wares controverted, and others, and to keep shops, by virtue whereof they have been in possession these 100 years: And as to the act of parliament *alleged* on, neither is the act confirmed, nor the act 1633 confirming, nor any other act of parliament, law or decision of the nation, did ever determine the limits or power of burghs-royal and burghs of barony; but it is clear by the acts confirmed, that they do relate to particular persons, dwelling without burgh, that such should not sell, top or keep shop; which cannot be meant to bodies corporate, as burghs of baronies; for if they might neither keep shop, nor top such ware, there were nothing remaining to them, but their fairs and market-days, which are frequently at Kirk-styles and hill-sides, where there is not a house: But seeing it is sure, that as the burghs-royal have their proper privilege incommunicable to burghs of barony; so they have also their proper privilege above the rest of the people, and the interest of the commonwealth; and the long custom doth best interpret, that these privileges were rather, that burghs-royal only should export and import all commodities to and from other nations; but that burghs of barony, and their inhabitants, by buying from merchants in burghs-royal, may not, by retail, top the same in smalls again to the people; there is neither law nor reason for it: And it was both a great disadvantage to the state, there being 40 or 50 miles between many burghs-royal; so that the people could not buy nor sell commodities without travelling thither; and also a great disadvantage to the burghs-royal who would vend very little, if nothing were topped in burghs of barony. The charger *answered*, That they opposed the acts of parliament, which are clear and particular against them, no such custom nor prescription can be respected; seeing the act of parliament 1633, confirming all, is but 25 years since: And the privilege of burghs-royal is not

not only to export and import, but also to return all staple-ware brought from other nations proper to be spared, and sold to them; else few merchants by trading in general might serve in every burgh, and the community thereof, that now bears huge taxes, might go as well to burghs of barony, and retail, as to burghs-royal, and before; but the privilege of burghs of barony is only to vent the growth and manufacture of the country, which is not staple-ware, to be exported to other nations for bringing in money; which they are not to do by keeping open shops, but by selling in the open markets on market-days; and the said acts of parliament are general against all persons living without burghs-royal; and there is no exception whether these persons live within burghs of barony or not. The Commissioners resolved to hear the act *in præsentia*, in respect the act was not clear whether they related to single persons only, or also to incorporations.

July 27. 1658.

BEITH *contra*—

MR ROBERT BEITH, donator to the escheat of umquhile Gilbert Grahame, pursues a declarator against wife and children, upon his own horning. The defenders *alleged*, *Absolutor*, because, by an act of Exchequer at the time of the passing of the gift, it is found and declared, that the horning is not stamped, and therefore is null. The pursuer *answered*, That he opposes the horning which is now stamped, and which he bydes by, as truly done by the messenger; and so cannot be taken away by exception, but must be improved by action. The defender *answered*, That by the act of Exchequer it is clear it was not stamped, and it cannot be now supplied; seeing he offers him to prove, that the messenger, executor thereof, was dead. The Commissioners sustained the defence and duply.

Eodem die.

SCOTT *contra* EDGERS.

THOMAS SCOTT having obtained decret, before the Bailies of Edinburgh, against John Edger in Dumfries, and Edward Edger in Edinburgh his cautioner, as law will; they suspend, upon this reason, That the Bailies did wrong, in decerning the cautioner, because it was offered to be proven, that he produced the principal in judgment at all diets in process, who was accordingly decerned, whereby the cautioner is free. The charger *answered*, *Non relevat*, unless it was *alleged* he produced him in judgment, and took instruments thereupon, and protested to be free; otherways the charger was not obliged to take notice of his compearance, seeing if the cautioner had protested, he would have put the principal in ward. The suspender *answered*, That he opposed the custom of the burgh, whereby the cautioner presenting the principal, without any protestations, is free. The charger *answered*, That he opposes his decret proving that it is not the custom of Edinburgh to find the cautioner free; seeing they decerned him. The Commissioners repelled the reason, in respect of the answer.

Eodem die.

LAUDER *contra* CORPHIN.

IN the compt and reckoning betwixt Lauder and Corphin anent the rent of the lands of Stonehouse uplifted by Carphin. The Commissioners found
Corphin

Corphin not liable for the services due by the tenants of Stonehouse, seeing he dwelt not upon the barony, and that these services are only due if they were exacted.

Eodem die.

M'RONALD *contra* the Tutor of LOVAT.

DONALD M'RONALD having pursued the Tutor of Lovat for ejecting him out of certain lands, and for the violent profits, the quantity being libelled, what the Room might, had, and shall, and what increase it might have; and finding the quantities most fully proven, took the pursuer's oath *in litem*, upon the worth of the lands; and accordingly decerned the defender to repossess, and to pay yearly the full worth of what the lands might pay, according to the pursuer's oath, by and attour the rent due to the master of the ground; and so modified the same to the double avail.

Eodem die.

H O P E *contra* the Laird of CLACKMANNAN.

HARY HOPE pursues the Laird of Clackmannan, for deforcing him, and the messenger, in executing a caption against the Laird of Sauchie, by taking him off the messenger's hands, for payment of the debt contained in the caption. The defender *alledged*, No process, 'till the deforcement were first cognosced and declared criminal. The pursuer *answered*, That seeing he insisted only for his debt, conform to the act of parliament, it ought to be sustained civilly. The Commissioners sustained the libel and reply.

Eodem die.

M'DOUGAL *contra* FISH, &c.

JAMES M'DOUGAL messenger, in an improbation, having been found to have forged a bond by the knowledge and consent of one Fish, and likewise Bryce Durhope agent having forged the attestation of cautioner in the suspension: The Commissioners, without referring the same to a criminal cognition, ordained the messenger's ear to be nailed to the Trone, and a paper upon his face declaring his forgery; and so to stand from ten of the clock to four in the afternoon, and to have the letter F burnt on his brow and the palm of his hand; and ordained Fish likewise to stand at the cross with a paper on his face, for his consent to the forgery, albeit that he *alledged* that the messenger deceived him, and affirming, that he might by his office set to the parties hands, seeing he consented and had his warrant; and ordained Bryce to be punished as Fish, and declared them incapable of public employments or office in all time coming.

July 29. 1658.

G R A H A M *contra* B R O W N.

JOHN GRAHAM pursues a reduction against John and William Brown, for reducing of an apprising led at their instance, against Robert Johnston of Swynefoot, of the lands of Overhullcluch, because the bond whereupon the apprising was led, was granted by Johnston after he was inhibit, at the instance of William Brown. The defender *aliedged*, *Ab-solutor*, Because the inhibition is null, at least cannot be extended to thir lands; because they lie not within the shire where the inhibition was published.

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The pursuer *answered*, That he having published his inhibition at the market-cross of the shire where Johnston dwelt, there is no more required by the act of parliament, which though it require registration, both in the sheriff-books where the person inhibited dwelleth, and where the lands lie ; yet doth not determine that the publication should be in both. The publication should be required at the market-cross where the lands lie, to take away dispositions of lands ; yet the ground of this being a personal bond, and both debtor and creditor living within the shire where it was published, it is sufficient as to them, and they are *in mala fide* thereby. It is *answered*, That tho' the act of parliament determines not where the publication should be, yet the law and custom of the nation doth determine it to be at both the cross where the inhibit dwelleth, and where the lands lie ; and there can be less date of the cross where the lands lie, because the inhibition having a real effect against lands, it is most proper to publish where the lands lie ; seeing persons that live there are readier to buy them than these who live near the owner in another shire. The Commissioners found the defence relevant, and that inhibition could not extend to thir lands, unless the Pursuer would instruct, that they were within the shire where it was published. The Pursuer farther *alleged*, That the nullity of the inhibition was not receivable by exception, but by reduction, seeing it could not be instantly verified, but consisted in fact to be proven, *viz.* That the lands lie not in the shire where the inhibition was used ; and so proves itself, unless the pursuer allege and instruct that the lands lie in that same shire, which he is content to find relevant. The Commissioners found the negative proved itself, and therefore received it by way of exception.

Eodem die.

WAUCHOP and her Daughter *contra* ANDERSON.

MARY WAUCHOP and her daughter, procreate betwixt her and Mr David Anderson, pursue Margaret Anderson, as executrix confirmed to her father, to pay the portions provided to the pursuers in their father and mother's contract of marriage. The defender *alleged*, *Absolvitor*, Because the executrix cannot be liable to pay these provisions ; seeing it is clear by the contract of marriage, That the heirs-male are provided to Mr David's estate ; and it is subjoined, That seeing thereby the heirs-female of the marriage will be excluded from all succession ; therefore Mr David binds and obliges himself, and his heirs-male succeeding to his estate, to pay these provisions to the heirs-female of the marriage : So that the portion is a burden upon the estate, lying only upon the heirs-male ; so that it cannot affect the executrix, who being children of the first marriage, have no provision of their father nor other means but this executry. The pursuer *answered*, That the defunct having obliged himself, *hoc ipso*, obliges his heirs, executors, and all others representing him ; and therefore under the name of heirs, executors are always comprehended ; as, under the name of heirs, a *hæres mobilium*, and a creditor has access either against executor or heir as he pleaseth, whatsoever relief they may have among themselves. The defender *answered*, That if the defunct had bound himself, expressing no farther, all representing him would be bound ; and tho' extraneous creditors may have their option, yet this pursuit being by bairns for their portion against other children, and the clause clearing the defunct's mind, that their portions should be a burden upon his heirs-male ; and whereas in former articles, he obliged him and heirs-male, and expresseth not, and other heirs

heirs whatsoever ; yet they are not comprehended under the name of heirs-male. The Commissioners found the defence relevant, and assoilzied.

Eodem die.

RICHARD COCKBURN *contra* his GRANDMOTHER.

RICHARD COCKBURN of Clerkington, pursues his grandmother for producing of all writs granted by or to his father, where either he may deliberate to enter heir or not, particularly to produce a discharge granted by his grandmother to his father at the time of his tutors accompts discharging an annualrent of seven chalder of victual out of his mains. The defender *alleged*, *Absolvitor*, Because this discharge being granted by herself, and being in her own hand, it is her own evident, and she is obliged to produce it to none. The pursuer *answered*, The defence ought to be repelled, because he offered him to prove, that it was his father's delivered evident. The defender *answered*, *Non relevat*, Unless the pursuer both prove, that it was his delivered evident, and that the defender has wrongously gotten it again in her hand ; for his sons might have delivered it back after it was delivered to him ; which must be presumed to be so, unless the contrary be proven, seeing *chyrographium apud debitorem repetitum præsumitur liberatum*. The pursuer *answered*, That the action holds in bonds and obligations, because the ordinary way is, when such are satisfied, only to return them without any discharge ; but it will not hold in a discharge which uses not first to be delivered, and then to be given back ; and therefore, seeing the pursuer offers to prove, that it was his father's delivered evident, the presumption can take no place ; but if the defender will offer to prove, that she got it back from her son, relevant. The Commissioners repelled the defence, in respect of the reply, and found the presumption to take no place in this case.

November 6. 1658.

H O P E *contra* **C L A C K M A N A N**.

HARY HOPE having conveyened the Laird of Clackmanan to pay 1000 merks owing to him by the Laird of Sauchie, in so far as Hary having apprehended Sauchie with caption to pay that sum, and in the messengers hands, and so *in custodia legali*, he deforced the messenger, and rescued the rebel in contempt of authority, and so ought in reason, for this contempt, be decerned in the debt, for deforcing a public officer in the execution of his office, at least, being art and part thereof, founded on the act of parliament 1551 and 1587, anent the civil and criminal pains of deforcers : *Alleged*, The summons is no way relevant in concluding payment of the sum against the defender, *esto* the libel was true, because the civil and criminal pains of deforcement is defined in law to be the tinsel of their moveables, and cannot be liable to such a pain as can evict his heritage, or trouble his person, as for civil debt, though he may be punished at the discretion of the judge ; for where there is neither law nor practice for a penal action, there can be none granted against a party, but on the pains specially contained in the acts of parliament. *Alleged*, It was arbitrary to the civil judge to lay on such pains as he pleased by the act 1581 ; and that since by the law a magistrate is liable for the rebel's debt when he escapes, *etiam sine sua culpa*, *multa magis* ought the deforcer to be liable for the debt owing to

to the pursuer. *Alledged*, There was *jus accipere*; but none for the other; and that it were most inconvenient if a man for being art and part in deforming a messenger should pay the debt, though L. 100,000 Sterling. On the other hand, contended, That the inconveniency were greater if one having art, &c. in deforcement were not liable; because a man of power may hound out a rogue to deforce a messenger who has not a cock to crow day, and the other to escape free. The Commissioners did not determine the question at this time; but desired them to alledge farther. Then *alledged*, That he was not deforced, in so far as it was offered to be proven, that Clackmanan had apprehended him before by virtue of letters of caption at his own instance, and had him in the messenger's hands to have imprisoned him, and having him in his house Saturday's night and Sunday, he was resolved to imprison him in Stirling on Monday; and so being Clackmanan's prisoner before, he had reason to hinder the pursuer from taking the rebel out of his hands. *Alledged*, The messenger ought not to have kept him in his house, but to have committed him to the public goal, and Clackmanan impeding him to put him *in custodia legali*, it was a deforming. The Commissioners found the alledgeance relevant to elude the libel, and assigned a day to prove.

Act. Gilmer

Alt. Nisbet.

November 11. 1658.

S C O T *contra* T E N A N T S.

SIR JOHN SCOT, having a wadset from this Earl Marishall's father, containing a back-tack for his security of 10,000 merks in the lands of —, and being publicly infest in the King's time, he conveens the tenants to pay him their duties, &c. conform to his right of wadset and infestment thereon. The Commonwealth compearing by their procurator, *alledged*, They ought to be preferred; because they offered to prove, that this Earl of Marishall, in whose place the estate is now come, by his forfeiture, was five years in the natural possession of the lands before this act of forfeiture; and so, conform to the act of parliament, JA. VI. p. 11. cap. 2. they ought to be preferred. They found this alledgeance relevant, and assigned a day to prove, notwithstanding that the pursuer was in this Earl's father's lifetime in possession, by payment of his annualrent 15 years before the forfeiture, which was *durus sermo*.

Act. Gilmer.

Alt. Advocatus.

November 12. 1658.

M U I R H E A D *contra* A N D E R S O N.

I N an action betwixt the parties for implement of a contract, found a party obliging him and his heirs, as well male, tailzie, &c. in one part of the contract, and obliging only his executors in another part of it, that the first does not exclude executors, nor the last include heirs.

Act. Anderson.

Alt. Norvell.

November 13. 1658.

M U R R A Y *contra* ———.

T H E presbytery of Coupar, having designed a glebe to Mr Gilbert Murray minister there; he conveening the heritor to remove, *alledged*, The presbytery could not in law design a glebe to this minister; because
there

there was one already designed to him, by virtue whereof he and his predecessors had been in possession 60 years. *Replied*, Unless it was *alleged*, that glebe contained four acres of land, and was sufficient for labouring, the alledgeance cannot be heard; for the old glebe cannot so much as bear windlestraws, and it is not three acres. *Alleged*, What the old glebe wanted of four acres, it should be made up to him. They sustained the new designation, notwithstanding of the possession of the old, the old not being good, and wanting something of a full glebe.

Act. Balfour.

Alt. Murray.

December 1. 1658.

OLIPHANT contra OLIPHANT.

OLIPHANT having recovered a sentence against Oliphant, as lawfully charged to enter heir to his father, and, on that decret, having arrested an heritable sum belonging to the father, conveens the debtor to make it forthcoming, and the heir who was lawfully charged for his interest. *Alleged*, By the debtor he was not *in tuto* to pay that sum; this kind of arrestment on a decret against one lawfully charged, not being *habilis modus transfereudi* of an heritable bond, and that another creditor comprising might make him pay it over again. It was *answered*, It was *habilis modus*; because the certification of the charge to enter heir bears clearly, that if he failed to enter, being charged, sicklike process, action and execution should pass against him as if he were entered; and so *fictione juris*, he is repute as served and retoured heir. They repelled the alledgeance, in respect of the reply, and decerned.

Act. Gilmer & Fife.

Alt. Maxwell & Oliphant.

Eodem die.

The Executors of STARK contra HARY HAY.

THE executors of Stark, pursuing Mr Hary Hay to pay a sum contained in a bond granted by him to the defunct. *Alleged*, The bond is null, being given by a son *in familia paterna*, without consent of his father, who is his administrator in law, just as a bond granted by a minor having curators, without their consent, is null. *Answered*, It is not alike, because a minor having chosen curators, that in effect interdicts him without their consent; which is not *in filio familiae*, who was a commissary-clerk for the time, and provided to public place, though minor. *Answered*, *A fortiori filius famil.* cannot be tied without the consent of his father; because the very disposition of the common law, in effect interdicts him without his father's consent, without any deed or election of his. This was not reported, but the parties desired to agree.

Act. Heriot.

Alt. Gilmer.

Eodem die.

NICOLSON contra Lord PHILORTH.

IN the foresaid action, *alleged* he could not be conveyed as successor *titulo lucrativo* to his good-father, who was caution in the bond granted by the Earl Marishall; because he offered to prove his father was served heir to his goodfather, and so having an heir served, he could not be conveyed as successor *titulo lucrativo* to him. *Replied*, The defender was suc-

cessor ; because, long before his father's service, he had got a disposition of that estate from his goodfather. *2do*, The service was general, where no infestment followed. They repelled the defence, in respect of the reply, and found, that service of the father, after the boy had gotten a disposition of the land, to be fraudulent, and merely contrived *in fraudem creditorum*.

A&. *Nisbet*.Alt. *Gilmor*.*Eodem die.*

IN the improbation of any writ produced by the party himself, somebody must be summoned to abide by it, and the pursuer must declare, if he insist in the direct or indirect way first. And if he first insist in the indirect, then he passes from the direct and cannot return to it : As also if a man assign a false bond, and the assigner pursue, he must either abide by it, though he be free of the falsehood or no ; and if he abide by it, though innocent, and the writ be improven, he will be punished.

A&. *Dunmuir*.Alt. *Alexander*.

December 20. 1658.

C A M N E T H A N *contra* M A T H I E.

THE Laird and Lady Camnethan pursuing Matthie as one of the four executors to pay the sum of _____ where it came to be debated, If an executor, meddling only with his own part, is liable *in solidum* for the haill debt owing by that defunct, or only *pro parte virili*. This was disputed, but not decided.

A&. *Nisbet*Alt. *Gilmor*.

December 21. 1658.

The COMMONWEALTH *contra* Lord BALMERINO.

THE Commonwealth pursuing Balmerino to pay a sum, contained in a bond granted by his father and some others, and registrate after the debtor's death. *Alledged*, No process, because not registrate in his lifetime, and who, after his decease, could not by his procurator's consent to the registration thereof, and so can make no more faith against this Lord, than a naked copy, which cannot be a title in law to convey him on, without the principal. Which the Lords found relevant.

A&. *Advocatus*,Alt. *Norvel*.*Eodem die.*I R V I N E *contra* K I L M A R N O C K.

THE Town of Irvine, being a burgh-royal, charges with general letters, conform to the act of parliament, the borough and barony of Kilmarnock to desist from tapping wine, from packing and peilling other staple commodities ; and to desist from exercising all other privileges and liberties belonging to burghs-royal, and to the prejudice of Irvine. When the question came to be debated in the inner-house, If, upon a general charge, Kilmarnock ought to desist from exercising the liberties of a burgh-royal, whereof they had been so long in possession without interruption, so summarily, without declarator.

declarator. When the Lords, upon consideration of the generality of the case, and being loath to decide therein, would not give out their sentence *in hoc judicio*, but remitted Irvine to their action and declarator.

Act. Gilmer.

Alt. Nisbet.

December 23. 1658.

D I C K *contra* his T E N A N T S.

QUINTON DICK having a wadset of some land from Campbell, (the case I do not well remember) and his infestment being redeemed by Campbell, by using an order of redemption against him and a decret of declarator obtained thereon, whereby his wadset was extinct and lawfully redeemed, is pursued by this Campbell to remove. Another Creditor, not called in the removing, compares, and *alleges* Dick's Tenants could not be removed, because he was infest in the wadset-lands, and by virtue thereof seven years in possession before this warning. *Replied*, Any infestment he had, flowed from Dick the defender, whose infestment being extinct by redemption, his infestment fell *in consequentiam*. *Duplicated*, No decret could prejudice his right, he not being called thereto. *Answered*, No necessity to call him, his infestment being but base, never clothed with possession. *Quadrupled*, He was seven years in possession by virtue of that right, before the decret of declarator, by obtaining decret of mails and duties against the tenants and this same pursuer. *Quintupled*, He behaved to say he was in possession, not only before the declarator, but before the order of redemption used against his author; for the instrument of premonition and order of redemption, made the lands *res litigiosa*; the decret of declarator was not obtained till long after, which interrupted the possession, and so he behaved to say seven years *ante rem litigiosam*. Which the Lords found relevant and decerned to remove.

Act. Wallace

Alt. Cunninghame.

December 28. 1658.

THERE was a contentious dispute betwixt the towns of Glasgow and Dumbarton, about their privileges upon the River of Clyde; after which I must inquire.

D E A N S *contra* —

Eodem die.

MR ROBERT DEANS pursuing for a legacy contained in a testament, wherein the testator discharges his latter-will anent the nomination of an executor, and other things; but is not subscribed in the body at all; and on the back of it is written, The testament of such a man. *Alleged*, It is no testament, not being subscribed. *Replied*, The testator was a Soldier, and therefore not tied to the solemnities required in a legal Testament. The Lords sustained the testament, they proving the back of it to be written by the testator, and to be his hand-writ.

Act. Deans.

Alt. Rankin.

Eodem

*Eodem die.*Lord *BALWAIRD* contra The Earl of *ANNANDALE*.

MUNGO Viscount of Stormont having tailzied the Lordship of Scoone to the Earl of Annandale, and the heirs-male begotten of his body; which failing to my Lord Balwaird and his heirs-male, on this express condition, that if Annandale or his heirs-male contract debt, in prejudice of the tailzie, that, *ipso facto*, he should fall from the right thereof, and the next person substitute in the tailzie to have right, on the forfeiture of this condition by Annandale. There is a reduction intended by my Lord Balwaird and this Earl of Annandale, to hear and see it found and declared, that that infestment of tailzie is null from the beginning, and amitted by my Lord Annandale, by contracting of debt, whereon comprising has followed; and *in consequentiam* all comprisings to fall led against the tailzied estate, upon debts contracted by Annandale, who had *ipso facto* amitted the right of tailzie, as said is. *Alledged* by the creditors, They were in *bona fide* to comprise the tailzied estate, my Lord not being inhibited by Balwaird; and that such conditions in tailzies were derogatory to the right of commerce. *Alleges* Annandale, He had not, *ipso facto*, amitted the tailzie; seeing he was willing to purge all these comprisings. This was not fully disputed and so not discussed.

A^c. Nisbet.A^t. Gilmer.*Eodem die.**M E R C E R* contra ———

JAMES MERCER, before his contract of marriage with Fordell's daughter, assigns and dispones his haill estate to her, reserving his own liferent, out of the love and favour he carried to her, and thereafter contracts marriage with her, and provides her to a jointure, and the heirs of the marriage to the land; she accepts this; he dies within a half year after the marriage without bairns, his heir raises reduction of that disposition; made by him before his contract, *ex hoc capite*, that it was done *contemplatione matrimonii*, (which was not true, being made by him out of love and favour only). *2do*, That she, by her contract of marriage, having accepted of a liferent posterior to the said disposition, he had in effect revoked that donation, and she had passed from it. *Answered*, That marriage having dissolved within year and day, she could not claim any liferent-right by virtue of her contract, and therefore the contract and marriage not being so fully consummate as might convey to her a liferent of the lands disposed, that can never in law prejudice the disposition and donation made by her husband to her before the contract. This was not fully disputed nor decided; but it was thought the disposition would stand good.

A^c. Gilmer.A^t. Gilmer.

January 1. 1659.

Lord *DUDHOPE* contra Lord *ARGYLE*.

IN the action of intrusion, pursued by my Lord Dudhope against my Lord Marquis of Argyle, for having possessed some parts and pertinents of the barony of Glystrie lying in Argyle, belonging to Dudhope, after Montrose had

had burnt and destroyed all Argyle, as he who vitiously entered *in possessionem vacua absque jure vel titulo*. Argyle *alledged*, he and his predecessors were infest in the lands libelled, and by virtue thereof in possession seven years before the intenting of this pursuit. *Item*, He entered not *vi* to the possession, both finding *vacuam possessionem* of his own lands, he might *de jure* enter without being liable to the violent profits, as a tenant to my Lord Dudhope, *quia per sua taciturnitate desit animo et corpore possidere*.

Añ. Gilmor. Alt. Norvell.

January 20. 1659.

The Earl of CALLENDAR *contra* his TENANTS.

THE Earl of Callendar, having married the Countess of Dunfermline, pursues the tenants of her conjunct-fee lands, to pay their mails to him. *Alledged*, No process, because he had renounced, before contract of marriage, in favours of his Lady, any right he could pretend to the duties of their lands *jure mariti*, and consented that my Lady should bruik this part of her conjunct-fee, and dispoñe thereon at her pleasure without him. *Answered*, Any renunciation made by my Lord in favours of my Lady, accresses to him by the consummation of the marriage. And it was contended in law there could be no right conceived to stand in the person of the wife, which did not recur to the husband, being *una et eadem persona*. The Judges after *avifandum* found the right accressed to the husband, and therefore decerned.

Añ. Gilmor. Alt. Fletcher.

January 22. 1659.

BUCHART *contra* HALYBURTON.

JOHN BUCHART, as executor creditor to John Davidson merchant in Dundee, convenes Alexander Halyburton to pay him 500 rixdollars, intromitted with by him, belonging to the said Davidson. *Alledged*, *Absolvitor*, because any intromission he had was by virtue of an assignation made by the defunct in his own time, for the like debt resting to him by Alexander, whereon he had recovered payment. *Replied*, Any assignation he had was null by act of parliament 1593, declaring all assignations made by rebels, in prejudice of the creditor, at whose instance he stands rebel and unrelaxed, to be null by way of exception or reply; but so it is, he was rebel, &c. *Duplied*, The defender was lawful creditor to the defunct, and had gotten this assignation for most onerous causes; and that the meaning of the act of parliament, was of fraudulent assignations, whereof this was none. Notwithstanding they found the assignation null, by way of exception.

Añ. Dunmuir. Alt. Maxwell.

January 24. 1659.

contra

MR ANDREW RUTHERFOORD, having left a year's stipend owing to him by his parishioners in legacy for repairing of the kirk, and the heritors being convened by ——— to pay it, they are decerned to pay it
M m m upon

upon probation, that the defunct, before witnesses, had destinated that sum for that end; which decret being craved to be reduced at the defunct's nearest of kin's instance *super hoc capite*, that a legacy of that quantity could not be proven by witnesses and so was null, the testator having disposed it by way of testament, tho' by the civil law, a nuncupative testament, *sine scripto*, be a good valid testament. *Replied*, This being *legatum ad pios usus*, it was *optime* probable by witnesses, *sine scripto*; because by our law, a legacy of L. 100, may very well be so proven; and this being a legacy of a stipend, is, in effect, but a legacy of L. 100, owing by his parishioners. *Duplied*, It is not alike, because *jus stipendii* is indivisible, and cannot be so proven in law as L. 100; which the Judges found relevant, and therefore reduced.

Aff. Learmont. Alt. Sinclair.

February 1. 1659.

— contra —

A man being bound by contract of marriage to provide the bairns of the marriage to such a sum, and the conquest during the time of the marriage, he notwithstanding provides that sum, and the hail conquest to three of the bairns of the marriage in prejudice of the fourth; whereon there is a declarator and reduction raised against the three bairns of that disposition made to them, to hear and see it found and declared, that a fourth part of the conquest belongs to him, and the assignation reduced *pro tanto*. *Alledged*, *Absolvitor*, because the father being heir of the sum and conquest, might in law dispose thereon as he thought fit. *Replied*, The father was debtor to his bairns, and they his creditors; it was granted that to a stranger he might assign, but not to some of his bairns in prejudice of the rest. This was not decided, but went to interlocutor.

Aff. Wedderburn. Alt. Oliphant.

February 2. 1659.

G R E I G contra T E N A N T S.

I N a triple poiding, raised by the tenants of Scotsraig against Andrew Greig and other creditors for the mails and duties, found that a base infeftment not clade with possession, though confirmed by the superior, and prior in date, is not equivalent to a public infeftment posterior in time; and that the confirmation of a base feisin makes not the right public, but only saves from forfeiture, recognition and ward; and though there was alleged a decret of mails and duties obtained by Andrew, yet being posterior to the public infeftment, it could not be preferred to it; whereas, if Andrew had but cited the tenants to pay their mails upon that base infeftment before the public infeftment, the question had been greater anent the preference, which, (as the case stood) could not prefer him against the other creditors who were publicly infeft, as said is; and so they preferred the other creditors publicly infeft before Andrew.

Aff. Wedderburn. Alt. Cheap.

February

February 5. 1659.

DUDHOPE contra ARGYLE.

THE Viscount of Dudhope, being infest in the barony of Glastric, pursues Argyle for intrusion and for repayment of the mails and duties during the time of the intrusion. *Alledged*, Argyle, He is infest in these lands, and by virtue thereof, seven years in possession. *Replied*, He behoved to say, he was seven years in possession before 1649, and condescended *quo modo* he came to the possession; for any possession he had was claim or *vi*. Dudhope, after the year 1648, being accessory to the engagement, durst not compete with my Lord Argyle, who took advantage of Dudhope's condition, and intruded himself, as said is, and from that time, being under sequestration, he could not pursue my Lord, either for removing or for mails and duties. The Commissioners assoilzied from the bygone mails and duties, and ordained Argyle to reposses Dudhope, and found him not *mala fides* possessor, his entry being *in possessione vacua*, and being infest in some parts and pertinents of that barony.

Aff. Gilmer. Alt. Nisbet.

Eodem die.

WILSON contra GRAHAME.

WILSON merchant in Glasgow, having, as is alledged, paid a sum to Grahame *indebite*, convenes him by an ordinary action of restitution of the sum. *Alledged*, *Absolvitor ab hoc judicio*, because the pursuer had paid him the sum by virtue of a sentence recovered against him before the Town-court of Glasgow, and so having right by virtue of a sentence, *non est locus conditioni indebiti, lib. 1. cap. de conditione indebiti*; but the defender must reduce. This defence was found relevant, and so the defender was assoilzied *ab hoc libello*.

Aff. Gilmer. Alt. Maxwell.

February 15. 1659.

STEWART contra ———

STEWART pursuing abstracted multures. *Alledged*, The defender is infest *cum molendino cum multurius*, and so could not be convened for abstracted multures. *Replied*, He was liable in abstracted multures, notwithstanding of that clause, because it was only insert in the clause of the charter *tenendas et habendas*, and not in the dispositive words, which cannot in law take away the right of the thirlage, unless that it were *per expressum* disposed, especially it being *molendinum Regis*, who was in immemorial possession of the multures, before the charter of feu and since. *Duplied*, Any possession the King had before the charter of feu was no way relevant, having ceded his right to the defender by the foresaid clause in his charter, which must include an exemption from thirlage; and any possession since is no way relevant, unless it be by virtue of a right, and there was no disparity in the King's mill and other men's mills; for if a charter, granted by any other superior, contained this clause, *in molendino cum multuris* in the *tenendas*, it would have exonerated the vassal from thirlage, albeit not in the dispositive clause; why should it not also exonerate *in molendino regis*? The Commissioners found a great disparity, and repelled the defence and duply,

in

in respect of the reply and triply. Then contended, he could not have action for the abstracted multures of the haille corns, but they must have deduction of teind, horse-corn, and expences of labouring; and that they could not be liable in multures, when the mill had not water. The Commissioners found the Defender liable in the multures ground for the use of their families; and that, in the want of water, he behoved to require the miller, and he refusing, that they might go by.

A&G. Gilmer. Alt. Nisbet.

Eodem die.

Earl of *DUNFERMLINE* contra the *TENANTS* of
BELTIE.

THE Earl of Dunfermline against the tenants of Beltie, being a spuilzie of teinds which was restricted to vitious intromission. *Alledged*, They could not be liable for the teind-sheaf, but for the fifth part of the haille stock, that being the declared quantity of the whole teind by act of parliament 1633. *Replied*, They behoved to be liable *in solidum*; because the act of parliament is to be interpreted of valued teinds, and in favours of heritors that are willing to value and buy their own teind; but it is *mandatum* to say, that heritors and tenants should meddle with unvalued teinds at their own hand, contrary to the meaning of the act 1633; and that it were to render elusory all processes for valuation of teinds. The Commissioners, in respect of the importance of the question, ordained the same to be heard *in præsentia*.

A&G. Fletcher. Alt. Wedderburn.

February 15. 1659.

WILKIE contra ———

DAVID WILKIE and Mr Alexander Clerk, being infest in the lands of ——— sometime belonging to the Laird of Kellie, obtained a decret for payment of their mails against the tenants in 1643; and thereafter, a woman having right to the liferent of these lands, who, by virtue thereof, had been in possession natural these seven years without interruption, and being convened by thir pursuers to pay them the mails, &c. she propones a defence, That she was infest in these lands, and by virtue thereof, seven years in possession without interruption. *Replied*, Long before her possession they stand infest, and were in civil possession by the decret foresaid, long before her. The Commissioners found their civil possession, being anterior, preferable to her natural possession *in judicio possessorio*; and therefore found their reply relevant, and assigned a day to prove.

A&G. Gilmer. Alt. Gilmer.

February 23. 1659.

Earl of *ERROL*, &c. contra ———

THE young Countess of Buccleugh being married on the eldest son of Sir Gideon Scot of Haychester before she was twelve years of age, and that without proclamation or warrant from the presbytery, with consent of her mother the Lady Wemyss, and some others of her tutors testamentars, there is a reduction raised of this marriage before the
Commissaries

Commissaries of Edinburgh, by the Earls of Errol and Tweeddale overseers, nominate in the Earl of Buccleugh's testament, with concurrence of other two of her tutors. The reason was *defectus consensus*, she being *impubes* the time of the said marriage, not having attained the full age of twelve years compleat, but wanting six months thereof; and on this dependence of the reduction of the marriage, there was a bill given in by the pursuer of the reduction to the Judges, craving the Countess to be sequestrate from her mother in some trusty hand till the process of reduction should close. The bill being seen, and answers made thereto in writ, wherein they dipped upon the question of the validity or invalidity of the marriage; the Commissioners, by their interlocutor, ordained the person of the young Countess to be sequestrate 'till the close of the reduction, and 'till she attained to the full age of twelve years complete, at which time it seems they inclined to think, she might, in law, declare her consent. It is to be noted, that Haychester whose son married the Countess, was one of the tutors himself, and so rendered the marriage the more suspect. In the disputes, there was great use made of the French *Plaidoy*.

Act. Sinclair. Fletcher. Alt. Gilmor. Wedderburn.

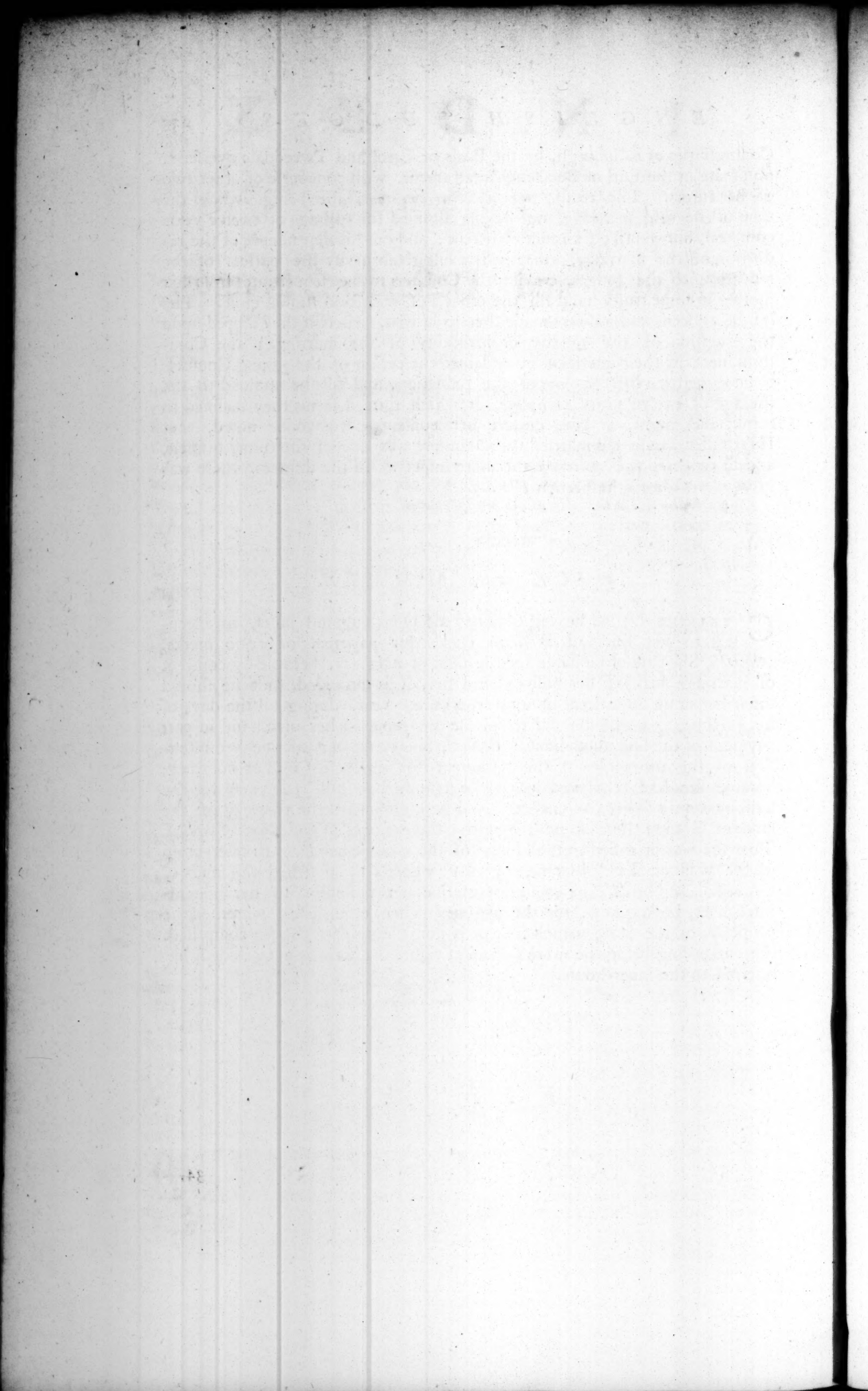
Eodem die.

D I C K *contra* M' M A T H.

CATHARINE DICK, having obtained a sentence against Janet, as executrix to her husband William Dick, for payment of 1000 merks. *Alledged*, She cannot be liable for the debt of executry, because by contract of marriage betwixt her husband and her, it is provided, that he should infest her in an annualrent of 4000 merks by year, during all the days of her lifetime, and that she did retain the moveables in her own hand in part payment of the said annualrent. *Replied*, She could not ascribe her retention of the moveables of the testament for implement of her contract; because she had recovered a sentence against her husband's heir for the haill bygones of her conjunct-fee, and had comprised the property of the lands of Grange therefor, and, by virtue thereof, was in possession. *Duplied*, That she was provided to the liferent of the Grange beside, with reservation of Sir William Dick's liferent, by virtue whereof she possessed the lands of Grange. *Answered*, She could not ascribe her possession to her liferent-infestment, having now, for the bygones of her conjunct-fee, comprised the property of the land, which liferent is consolidate with the fee comprised, the comprising being the more sovereign right. This was not decided, but referred to the inner-house.

N n n

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N. B. There are some Decisions, where the names of the Pursuer and Defender are not mentioned.

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